91-884

Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

October Term, 1991

FARM CREDIT SERVICES

Petitioner,

vs.

RAYMOND LIONE MORTER D/B/A SWINENGINEERING, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the language of 11 U.S.C. §541(c)(2) of the United States Bankruptcy Code creates an exclusion from a debtor's bankruptcy estate that is restricted to the debtor's beneficial interest in a traditional spendthrift trust as defined by applicable state law?

2. Whether the Teachers Insurance and Annuity Association Annuity Contract that the Respondent has an interest in is a traditional spendthrift trust as defined by New York State law?

LIST OF PARTIES

The following persons and entities were parties to the proceedings in the Court of Appeals for the Seventh Circuit; the petitioner in this Court is italicized, all others are respondents:

No. 90-1534

Plaintiff-Appellant: Raymond Lione Morter a/k/a, d/b/a Swinengineering, Inc.

Defendant-Appellee: *Farm Credit Services.*

Amicus Curiae: Teachers Insurance and Annuity Association of America and College Retirement Equities Fund

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in *Raymond Lione Morter a/k/a, d/b/a Swinengineering, Inc. vs. Farm Credit Services*, No. 90-1534, on July 16, 1991. The judgment reversed the United States District Court for the Northern District of Indiana and ruled that the respondent's Teachers Insurance and Annuity Association Annuity/Retirement Plan was excluded from his bankruptcy estate under 11 U.S.C. §541(c)(2).

OPINIONS BELOW

The decision of the Seventh Circuit of July 16, 1991 is reported at 937 F.2d 354. (Appendix p. A-32)

The decision of the district court of February 6, 1990 is reported at 110 B.R. 390. (Appendix p. A-22)

The decision of the United States Bankruptcy Court Northern District of Indiana Hammond Division at Gary/Lafayette, Bankruptcy No. 86-40369, by the Chief Judge, Kent Lindquist on July 7, 1989, held that the Respondent's interest in his retirement plans were property of the bankruptcy estate and that the only exemption the respondent could take was a $100.00 intangible personal property exemption allowed by Indiana law. I.C. 34-2-28-1(a)(3). (Appendix p. A-3)

JURISDICTION

The judgment to be reviewed was entered on July 16, 1991. No petition to rehear the judgment was filed.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The statute under review in this case, 11 U.S.C. §541(c) provides in pertinent part:

> (1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable non-bankruptcy law —
>
> (A) that restricts or conditions transfer of such interest by the debtor; or
>
> (B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking

possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law in enforceable in a case under this title.

STATEMENT OF THE CASE

Facts

On June 4, 1986, Respondent filed his petition for relief under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Indiana, Hammond Division at Lafayette. The Respondent's schedule B-4 identified that he had at the time of filing an interest in two annuities identified as the College Retirement Equity Fund ("CREF") and the Teachers Insurance and Annuity Association ("TIAA").

At the time the Respondent filed his Chapter 7 petition, he was an employee of Purdue University. The Respondent's interests in these two annuities were also described as the Purdue University TIAA-CREF Retirement Plan ("Plan"). The respondent valued his interest in the TIAA plan and his interest in the related CREF plan at $280,795.86 and claimed this entire amount as exempt pursuant to I.C. 27-2-5-1 and I.C. 34-2-28-1 (Indiana Code 1980). (Appendix p. 1)

Purdue University pays the entire cost of participation in the Plan and a participant may make voluntary extra payments to the Plan but the Respondent made no voluntary extra payments. The Plan contains anti-alienation language which essentially prohibits assignment and protects the Respondent's interest in the Plan from the claims of creditors. The Plan does not provide for loans or cash surrender. The Respondent is 100% vested in the Plan. The Respondent's date of birth

is September 7, 1920. The Plan states that annuity income generally begins at the normal retirement age. The normal retirement age is defined in the Plan as the age of 66 for participants employed prior to July 1, 1948 and age 65 for participants employed after July 1, 1948. From August 1, 1959 to August 30, 1960, Respondent participated in the Plan as an employee of Iowa State University. Effective July 1, 1960, Respondent began his employment at Purdue University. Respondent has been a participant in this Plan since August 1, 1959 and the normal age of retirement applicable to Respondent is 65. Mandatory retirement age is identified by the Plan as age 70. Once Respondent retires, he can chose from several options regarding payment of annuity benefits.

Respondent was forced to retire at age 70 in the fall of 1990 because of Purdue's mandatory retirement policy. As a condition of his employment at Purdue, Respondent was required to participate in Purdue University's retirement plan.

The TIAA component of the plan is a non-profit, legal reserve life insurance policy that promises to pay a fixed annuity for life based on a contractually guaranteed rate of return, plus dividends, when a beneficiary reaches retirement age. When a participate retires, TIAA applies pre-retirement contributions to purchase a fixed annuity contract for the participant's benefit. TIAA places the pre-retirement accumulations in the payout annuity pool. The Plan then evaluates the participants life expectancy and calculates benefits for him. The Plan adjusts the benefits of all other participants in the annuity pool based on that expectancy. If the participant dies before the time projected, the other participants in the pool will have more funds available to them. If the participant outlives TIAA's projection, the contributions of the other participants to the annuity pool will be used to continue the contractually guaranteed benefits and dividends as declared. Annuity income begins not longer than April 1st of the calendar year following the year in which an annuitant attains the age of 70 1/2 years.

Proceedings Below

At the time Respondent filed his Chapter 7 bankruptcy petition, he was indebted to Petitioner by virtue of a promissory note and mortgage executed on or about December 17, 1980. The original loan was made by the Federal Land Bank of St. Paul to Respondent, R. William Morter and Carol A. Morter in the original sum of $300,000.00. Subsequent to the abandonment of the real estate securing this debt, the foreclosure of the mortgage and sale of the real estate, Respondent remains indebted to Petitioner in the sum of $66,293.48.

This litigation began on August 8, 1986 when Petitioner filed its objection to Respondent's schedule B-4 and specifically the Respondent's assertion that his interest in the plan was exempt. The standing Chapter 7 Trustee also filed an objection to this exemption claimed by Respondent. This matter was submitted to the Bankruptcy Court by way of a stipulation of facts filed by counsel for Petitioner, the Trustee and counsel for Respondent.

On July 6, 1989, the Bankruptcy Court issued a memorandum and order ruling that the objections to Respondent's claimed objections are sustained and the TIAA and CREF annuity contracts are property of Respondent's estate pursuant to 11 U.S.C. §541(a)(1). The Bankruptcy Court also ruled that the only exemption that is allowable on these annuity contracts is $100.00 as an intangible personal property right pursuant to I.C. 34-2-28-1(a)(3).

Respondent filed a timely Notice of Appeal from the order of the Bankruptcy Court. The District Court on February 6, 1990 found that the CREF components of Respondent's retirement plan is excluded from the bankruptcy estate pursuant to 11 U.S.C. §541(c)(2). The District Court further found that the TIAA annuity contract is not a trust and Respondent's interest in the TIAA annuity contract was an asset of the bankruptcy estate. The case was remanded for determination of the value of the TIAA Plan. The District Court also specifically found that

the Bankruptcy Court correctly applied Indiana law regarding the Indiana exemption statute then in existence and properly determined that the only allowable exemption on the annuity contract is the $100.00 intangible personal property exemption identified at I.C. 34-2-28-1(a)(3).

On March 6, 1990 Respondent filed his Notice of Appeal. On July 16, 1991 the United States Court of Appeals for the Seventh Circuit found that both the TIAA and CREF components of Respondent's retirement Plan are "exempted" from the bankruptcy estate under 11 U.S.C. §541(c)(2). The part of District Court's judgment including the TIAA portion of Respondent's retirement plan in the bankruptcy estate was consequently reversed.

REASONS FOR GRANTING THE WRIT

I. THE INTERPRETATION AND JUDICIAL ADMINISTRATION OF 11 U.S.C. §541(c)(2) IS INCONSISTENT AMONG THE FEDERAL COURTS OF APPEALS. LITIGATION REGARDING THIS STATUTE HAS CAUSED AN IRRECONCILABLE CONFLICT AMONG THE FEDERAL COURTS OF APPEALS WHICH CAN ONLY BE RESOLVED BY THIS COURT.

A. The conflict among the federal courts of appeals regarding the interpretation and administration of 11 U.S.C. §541(c)(2) is substantial and irreconcilable.

Courts are certainly split on the factors for determining whether a given set of restrictions on transfer and a bankruptcy debtor's access are sufficient to warrant exclusion of a retirement or pension plan from a bankruptcy estate under 11 U.S.C. §541(c)(2). A spendthrift trust is a trust "created to provide a fund for the maintenance of a beneficiary and at the same time to secure the fund against his inprovidence or incapacity." *Blacks Law Dictionary* p. 1400 (6th ed. 1990). Characterizing a retirement plan as a spendthrift trust is another way of stating the conclusion that it must be excluded from the

bankruptcy estate. Exclusion from the bankruptcy estate prohibits creditor access.

A majority of the courts of appeals that have reviewed this issue, have held that a retirement plan must constitute a traditional spendthrift trust under applicable state law to be excluded from the estate.

Initially, the Bankruptcy Code was intended to create a more uniform and comprehensive scope to "property of the estate" which is subject to the reach of a debtor's creditors than had previously existed under the old Bankruptcy Act. S.Rep. No. 95-99, 95th Cong., 2d. Sess. 82 (1978). Under Section 70(a) of the earlier Act, the inclusion of an asset within the estate varied in accordance with an individual examination of the legal nature of the asset and in light of the purposes of the Bankruptcy Act. The designated policy was to secure for the benefit of creditors everything of value the bankrupt might possess in alienable or leviable form, but to permit a bankrupt to accumulate new wealth after the date of his petition and to allow him an unencumbered fresh start. *Matter of Goff*, (5th Cir. 1983) 706 F.2d 574. Under §541 of the Code, all property in which a debtor has a "legal or equitable interest" at the time of the bankruptcy comes into the estate, 11 U.S.C. §541(a)(1). This is so "notwithstanding any provision [except as recognized in subsection (2)] that restricts or conditions transfer of such interest by the debtor." *Id.* The sweeping scope of this automatic inclusion was intended to remedy much of the old Act's perceived deficiencies. "The Act was a complicated melange of references to State law, and did little to further the bankruptcy policy of distribution of the debtor's property to his creditors in satisfaction of his debts." Matter *of Goff, supra*, at 578. The broad definition of property in the Bankruptcy Code is further emphasized in the language of §541(c)(1)(A). It provides, with one caveat, that "any provision that restricts or conditions transfer" of property of the debtor is ineffective in bankruptcy to keep the property from becoming part of the estate. 11 U.S.C. §541(c)(1)(A). The caveat situation, in which a

restriction will keep property free from the estate, is set out in subsection (2):

> A) a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law in enforceable in a case under this title.

11 U.S.C. §541(c)(2). The plethora of litigation that has developed around this Code section is based upon the interpretation of the phrase "under applicable non-bankruptcy law." Debtors seeking to protect their interests in retirement or pension plans argue that such a property interest shall be excluded from the bankruptcy estate if the terms of their pension or retirement plans contain any restrictions against assignment or alienation and any prohibitions against access.

The majority of Courts of Appeals deciding this issue have ruled that Congress intended to exclude only trust funds in the nature of spendthrift trusts from the property of the estate. This conclusion is generally reached through a three step analysis. First by an examination of the legislative intent behind the broad reference in §541(c)(2) to "applicable non-bankruptcy law." Second by consideration of the overall congressional scheme envisioned in the Bankruptcy Code, particularly the exemption election provision of §522 which directly addresses the degree to which pensions may be exempted and the relationship and effect upon ERISA of the Bankruptcy Code. The conclusion most courts have reached is that the legislative intent along with existing statutory law lead to the conclusion that §541(c)(2)'s reference to "applicable non-bankruptcy law" was an acknowledgment of traditional state spendthrift trust law. *Matter of Goff, supra.* The court in *Goff* reviewed the legislative history of §541(c)(2) and emphasized that all references to granting a debtor an exclusion from property of the estate are restricted to a debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable State law. H.R. Rep. No. 95-595, 95th Cong.2d Sess. 369 (1977); S. Rep. No. 95-989, 95th Cong.2d Sess. 83. The

recurring references to applicable State law in this legislative history convinced the court in *Goff* that Congress intended by its reference to "applicable non-bankruptcy law" in §541(c)(2) to exempt from the estate only those spendthrift trusts traditionally beyond the reach of creditors under state law. *Id.* at 582.

Most Circuits which have considered this issue, have adopted the holding in *Goff*. The court in *In Re Daniel* (9th Cir. 1985) 771 F.2d 1352 ruled that the phrase "applicable non-bankruptcy law" in 11 U.S.C. §541(c)(2) was intended to be a narrow reference to state spendthrift trust law and not a broad reference to all other federal laws, including ERISA and the Internal Revenue Code, which prohibit alienation. This court specifically ruled that ERISA-qualifying pension plans containing anti-alienation provisions are excluded pursuant to §541(c)(2) only if they are enforceable under state law as spendthrift trusts. See *In Re Graham* (8th Cir. 1984) 726 F.2d 1268; *In Re Lichstrahl* (11th Cir. 1985) 750 F.2d 1488 and *In Re Jordan* (9th Cir. 1990) 914 F.2d 197.

Other Circuits have not followed the above cases and have interpreted the legislative history of §541(c)(2) as being more broad and not limited to traditional spendthrift trusts. In *McClean v. Central States, Southeast and Southwest Areas Pension Fund* (4th Cir. 1985) 762 F.2d 1204, the court stated that §541(c)(2) should not be confined in its recognition of enforceable transfer restrictions to those found in traditional spendthrift trusts. The court stated that the language of the statute and its legislative history do not identify a requirement that a trust be traditional nor is there any definition of what might be found to constitute a traditional trust. Consequently, this court held that the debtors interest in an ERISA qualified pension plan is not property of the estate and, therefore, the proper subject of a Chapter 13 Trustee's pay order because the anti-assignment provisions contained in the pension plan were enforceable under Illinois spendthrift trust law even though the pension plan may not have constituted a traditional spend-

thrift trust under Illinois law. The courts that have followed *McClean's* reasoning have characterized their interpretation of §541(c)(2) as less limiting than the statutory interpretation followed by the courts following the reasoning in *Goff*. The courts following *McClean* reject the contention that §541(c)(2) should be confined in its recognition of enforceable transfer restrictions to those found in traditional spendthrift trusts. These Circuits emphasize that if Congress had intended §541(c)(2) to only apply to state spenthrift trusts the term spendthrift trust would have appeared in the statute rather than the phrase "applicable non-bankruptcy law." *In re Moore* (4th Cir. 1990) 907 F.2d 1476. "The term 'applicable non-bankruptcy law' suggests no limitation to state spendthrift trust law, and we refuse to read such a limitation into the statute." Id. at 1478.

Due to this irreconcilable conflict, Circuits that must decide an issue depending upon the interpretation and application of 11 U.S.C. §541(c)(2), must choose between the 2 above identified positions. At this time, there is no uniform rule regarding the interpretation and application of §541(c)(2).

The court in, *In Re Lucas* (6th Cir. 1991) 924 F.2d 597, had to decide whether a savings and retirement plan, identified as an ERISA-qualified pension plan, was property of the debtor's bankruptcy estate and thus subject to turnover to the trustee in bankruptcy. As this court began to analyze this issue and the applicability of §541(c)(2) it stated; "There is a split among the courts which have considered the issue of whether ERISA constitutes "non-bankruptcy law." Several circuits have interpretated the phrase narrowly relying on the legislative history to hold that §541(c)(2) was intended to refer only to state spendthrift trust law." *Id.* at 600. The court stated that under this majority view, only those ERISA pension plans which qualify as spendthrift trusts under the applicable state law will be excluded from property of the bankruptcy estate. This court went on to say that a minority of courts have held that ERISA does constitute applicable non-bankruptcy law and ERISA

benefits which are subject to that act's anti-alienation provisions are excluded from the bankruptcy estate under §541(c)(2). The court in *Lucas* emphasized that the courts adopting this position have relied on the "plain language of the statute, which on its face does not limit applicable non-bankruptcy law to state spendthrift trust law." *Id.* This court did not review the legislative history as it deemed such a review improper as the language in §541(c)(2) was deemed to be unambiguous.

The case sub judice is a good example of the confusion created by this conflict. As noted above, the majority of courts that have ruled on this issue have followed *Goff.* Only the Fourth Circuit Court of Appeals had ruled contrary to *Goff* on this issue prior to the recent decision in *Lucas.* Prior to the Seventh Circuit Court of Appeals decision in the case sub judice, all of the reported bankruptcy court decisions and all of the district court decisions that analyzed §541(c)(2) within the jurisdiction of the Seventh Circuit Court of Appeals supported the majority position. These courts uniformally ruled that §541(c)(2) only provides for an exclusion from the bankruptcy estate for the debtor's interest in a traditional spendthrift trust as defined by relevant state law. See *In Re Hohl* (B.Ct. Il. 1987) 81 B.R. 450; *In Re Silldorff* (C.D. Il. 1989) 96 B.R. 859; *In Re Dagnall* (B.Ct. Il. 1987) 78 B.R. 531; *In Re Gifford* (N.D. In. 1988) 93 B.R. 636 and *In Re Jones* (N.D. In. 1984) 43 B.R. 1002. Despite this great weight of authority uniformally analyzing the phrase "applicable non-bankruptcy law" in §541(c)(2), the Seventh Circuit Court of Appeals opted to follow the Court's decision in *McClean* and ruled that the plain language of §541(c)(2) does not require that a retirement plan be a traditional spendthrift trust to gain an exclusion from a bankruptcy estate.

At the present time, four Circuits have ruled that the language of §541(c)(2) refers to a traditional spendthrift trust as defined by state law. Three Circuits have ruled that §541(c)(2) is not so restrictive and that any plan that has anti-alienation

language that is enforceable under state law will gain the exclusion provided for under this section.

One of the prime purposes of certiorari jurisdiction is to bring about uniformity of decisions on issues that are in direct conflict among the federal courts of appeal. This is especially true when the conflict among the Circuits is on an issue of statutory construction. *McElroy v. United States* (1982) 455 U.S. 642, 71 L.Ed.2d 522, 102 S.Ct. 1332; *Lehman v. Lycoming Co. Children's Services* (1982) 458 U.S. 502, 73 L.Ed.2d 928, 102 S. Ct. 3231.

The conflict among the Circuits regarding the construction of this Bankruptcy Code section continues. The decision by the Seventh Circuit Court of Appeals exemplifies and emphasizes the uncertainty that this conflict has created among the bar and the judiciary. So long as this conflict is allowed to continue, the litigation regarding this issue will continue to proliferate. A decision from this Court is the only means by which this conflict can be resolved.

II. THIS ISSUE REPRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The conflict regarding the interpretation and application of §541(c)(2) of the Bankruptcy Code is a recurring issue. Each court faced with this issue must choose from conflicting decisions to determine how to interpret and apply the provisions of §541(c)(2). See *In Re Lucas, supra*. There is presently no consistent guideline regarding how to interpret and apply this significant Bankruptcy Code section.

Whenever there is a conflict among the Circuits regarding a matter of administration of the Bankruptcy Code, this court has intervened to resolve the conflict and clarify the application

of the Bankruptcy Code. *New York v. Saper* (1946) 336 U.S. 328, 93 L.Ed. 710, 69 S.Ct. 554. This Court has held that the dual purpose of the Bankruptcy Code is to convert the estate of the bankrupt into cash and distribute same among the bankrupt's creditors and to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. *Kokoszka v. Belford* (1974) 417 U.S. 642 41 L.Ed.2d 374, 94 S.Ct. 2431.

This conflict among the Circuits has caused substantial confusion regarding the meaning of an important Bankruptcy Code section. Individuals eligible for protection under the Bankruptcy Code may be reluctant to seek such protection from their creditors due to the uncertainty regarding creditor accessability to retirement or pension assets. Further, the creators or settlors of retirement and pension plans are left with uncertainty regarding the ability of their plans to resist creditor access. A national retirement plan such as the Teachers Insurance and Annuity Association of America ostensibly could be subjected to different results regarding creditor access depending on what Circuit their retirement plan is challenged in.

This Court has assumed certiorari jurisdiction to resolve a conflict that involves an intolerable conflict of statutory construction. *Shepairo v. U.S.* (1947) 335 U.S. 1, 92 L.Ed.2d 1787, 68 S. Ct. 1375. A decision from this Court is the only means by which the interpretation and application of §541(c)(2) can be resolved and an uniform national rule be identified. A uniform rule regarding this Bankruptcy Code section is desparately needed to reduce the conflicting litigation in this matter and to end the present war of words amongst the Federal Circuit Courts of Appeals who are confronted with this issue. See *Commissioner of Internal Revenue v. Vilder* (1962) 369 U.S. 499, 8 L.Ed.2d 65, 82 S.Ct. 881. The only means by which this conflict on this important federal question can be resolved is by the review and resolution of this issue by this Court. *Aldinger v. Howard* (1976) 427 U.S. 1, 49 L.Ed.2d 276, 96 S.Ct. 2413.

III. RESOLUTON OF THIS CONFLICT IS IMPORTANT TO DECIDING THE CASE SUB JUDICE BUT WILL ALSO HAVE A SUBSTANTIAL IMPACT ON THE PUBLIC.

Petitioner has argued throughout this litigation that 11 U.S.C. §541(c)(2) provides for an exclusion from the bankruptcy estate only for a debtor's interest in a traditional spendthrift trust. As indicated above, this position is supported by a majority of Federal Courts of Appeals who have decided the issue. This interpretation of §541(c)(2) is significant to the case sub judice as it effects the analysis of the Respondent's interest in the TIAA pension plan.

Petitioner has argued that the TIAA plan is nothing more but an annuity insurance contract. The Bankruptcy Court agreed with the Petitioner as well as the District Court. Because the courts below characterized the Debtor's interest in the TIAA Plan an interest in an annuity insurance contract, the exclusion provided for in §541(c)(2) was not applicable to the Respondent and Petitioner and the Respondent's other creditors were ruled to have access to this substantial asset.

The interpretation of §541(c)(2) is critical to the ultimate decision of whether or not Petitioner has access to the Respondent's retirement fund. The Respondent's retirement plan has anti-alienation language that is enforceable under state law. Assuming that the correct interpretation of §541(c)(2) is that followed by the majority of Circuits, the presence of this anti-alienation language is not sufficient to preclude creditor access to the retirement fund. Under the majority analysis, the retirement plan must be a traditional spendthrift trust to gain exclusion from the bankruptcy estate. An annuity insurance contract that contains enforceable anti-alienation language is not sufficient to gain the §541(c)(2) exclusion.

The majority rule adds certainty to an analysis under §541(c)(2). As exemplified by the decision of the Seventh Circuit Court of Appeals, utilization of the minority rule causes a

reviewing court to begin a substantial analysis of the terms of the subject retirement plan to reach a decision. If the minority rule is adopted, then the reviewing court must then decide if the subject retirement plan has sufficient indicia of a spendthrift trust to gain the exclusion. This fact specific analysis creates uncertainty and instigates litigation as there is no uniform rule as to what constitutes sufficient indicia of a spendthrift trust to gain the §541(c)(2) exclusion. The Seventh Circuit conducted an extensive examination of the Respondent's interest in the TIAA retirement plan and concluded that sufficient indicia existed to gain the exclusion. Petitioner respectfully believes that this decision is in error by its failure to follow the majority rule. The acceptance of the majority rule would result in a different decision, a decision which would affirm the District Court's analysis.

Petitioner believes that the acceptance of the majority rule regarding the interpretation and application of §541(c)(2) provides a more uniform rule and would eliminate or at least restrict the problematic analysis a reviewing court must undertake to determine if sufficient indicia of a spendthrift trust exist to gain exclusion. The majority rule mandates that a debtor's interest must consist of a traditional spendthrift trust as defined by applicable state law. Petitioner believe this creates a more certain, objective and consistent rule for applying this section of the Bankruptcy Code. Section 541 (c) (2) is an exclusion provision. As such it is strictly construed. *In Re Cress* (S.D. Ind. 1991) 127 B.R. 194. Limiting "applicable nonbankruptcy law" to state spendthrift law effects a narrow construction of §541(c)(2), construes §541(a) broadly, and carries out the Code policy of marshalling the debtor's assets for the benefit of creditors. "Section 541(c)(2) is the only express exception to the general rule of §541(c)(1) which generally invalidates restrictions on the transfer of property." *Id.* at 198.

The resolution of this conflict is important also for public policy reasons. This Court has recognized that the purpose of the Bankruptcy Code is to convert the estate of the bankrupt

into cash for distribution among creditors but also to give the bankrupt a fresh start with such exemptions and rights as the Code designates. *Kokoszka, supra.* What needs to be established by this Court is what rights are being granted by the Bankruptcy Code pursuant to §541(c)(2). 11 U.S.C. §541(a) identifies what property becomes part of a bankrupt's estate. If a property interest is found to exist, the property becomes a part of the estate and automatically passes to the trustee on the filing of the petition in bankruptcy, unless otherwise excluded. *In Re O'Brien* (E.D. Va. 1985) 12 C.B.C.2d 1161. Section 541 includes in the estate all the property of the debtor, even property needed for a fresh start. The exemptions and exclusions in the Bankruptcy Code are designed to meet the purpose of retaining for the bankrupt property sufficient for a fresh start. *In Re Reagan* (5th Cir. 1984) 741 F.2d 95. The assets available to a bankrupt for a fresh start are specifically limited by the exclusion and exemption scheme of the Code. It is not the intent of the Bankruptcy Code to allow a debtor to obtain a bankruptcy discharge and subsequent to that discharge have access to a substantial asset. *In Re Sundeen* (C.D. Il. 1986) 62 B.R. 619; *In Re Werner* (D. Mn. 1983) 31 B.R. 418. If the exclusion rule of §541(c)(2) is not as specific as possible, then what form of property interest that can qualify for this exclusion is left to speculation. The less specificity provided by §541(c)(2) the greater potential for speculation and related litigation.

Petitioner believes that the majority rule provides the specific rule necessary to limit this potential speculation. Simply, under the majority rule a debtor must have a retirement plan that constitutes a traditional spendthrift trust under applicable state law. Under the minority rule a debtor can qualify for the exclusion if his interest in his retirement plan is deemed to have sufficient indicia of a spendthrift trust. What constitutes sufficient indicia of a spendthrift trust is open to speculation and creates the mountain of litigation that has been generated by the conflict regarding the interpretation of §541(c)(2).

This conflict cries out for an examination by this Court. Only this Court has the ability to resolve this conflict and establish a uniform rule regarding this issue of interpretation and administration of this section of the Bankruptcy Code. Sup. Ct. R. 10.1(a) & (c).

CONCLUSION

The writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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November 7, 1991

FILED
DEC 26 1991
OFFICE OF THE CLERK

No. 91-884

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FARM CREDIT SERVICES, PETITIONER,

v.

RAYMOND L. MORTER, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

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APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

IN RE: JACK and EVA REYNOLDS, No. 87-15311 F
Ch. 7

Debtors

ORDER

Based on the Memorandum Opinion of even date, the Court finds that the monies in the College Retirement Equities Fund Certificate issued in the name of Jack D. Reynolds is not property of the estate. Therefore, pursuant to 11 U.S.C. § 541(c)(2), the Court finds that the trustee has no interest in the above-mentioned certificate.

IT IS SO ORDERED.

/s/ Robert F. Fussell
ROBERT F. FUSSELL
UNITED STATES BANK-
RUPTCY JUDGE

DATE: /s/ 9-18-1989

cc: Mary Winzerling, Esq.
P.O. Drawer 3456
Fayetteville, AR 72702

Marion Wagner, Esq.
121-A South Second Street
Rogers, AR 72756

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

IN RE: JACK and EVA REYNOLDS, No. 87-15311 F
Ch. 7

Debtors

MEMORANDUM OPINION

Pending before the Court is a Motion to Deny the Debtors' Exemption of Annuity Plans filed by the trustee. A hearing was held on June 20, 1989 at which time the parties agreed to a stipulation of facts and introduced exhibits. Initially, the debtors listed their interest in the annuity plans as exempt; however, at the hearing the Court allowed the debtors to change their position and argue that the annuities were not property of the estate.

JURISDICTION

This Court has jurisdiction to enter a final order in this core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). The following constitute the Court's findings of fact and conclusions of law.

FINDINGS OF FACT

The Court received into evidence two documents: a Teacher's Insurance and Annuity Association retirement annuity contract (TIAA) and a College Retirement Equity's Fund retirement unit - annuity certificate (CREF). As of the date of the filing of the debtors' bankruptcy petition the CREF annuity totalled $3,275.44.

Page 3 of the CREF certificate provides the following information. The certificate was issued to Jack D. Reynolds on February 1, 1985 and the annuity starting date is listed as March

1, 1999. Pertinent language on this page states: "This certificate is made and delivered in and is to be performed in the State of New York. The validity and effect of this certificate are governed by the laws there in force."

The CREF certificate contains the following provisions that are also pertinent to the issue before the Court.

(a) Paragraph 29 - "Ownership. You own this certificate. During your lifetime, you may, to the extent permitted by law, exercise every right given by it without the consent of any other person."

(b) Paragraph 30 - "No Assigment. Neither you nor any other person may assign, pledge, or transfer ownership of this certificate or any benefits under its terms. Any such action will be void and of no effect."

(c) Paragraph 31 - "No Cash Surrender or Loans. This certificate does not provide for cash surrender or loans."

(d) Paragraph 36 - "Protection Against Claims of Creditors. The benefits and rights accruing to you or any other person under this certificate are exempt from the claims of creditors or legal process to the fullest extent permitted by law. This protection is contained in the statute of the State of New York establishing CREF."

A general reading of the CREF certificate indicates that it is an annuity contract, wherein premiums are paid to purchase units of the fund. *Cert.* page 5. The certificate does not lapse if premium payment ceases, and premium payments may be resumed at any time. *Cert.* page 5-6. The annuity starting date is set as the first month after the annuitant's sixty-fifth birthday, but may be changed. *Cert.* page 6. In the event of the annuitant's death prior to the annuity starting date, a death benefit is available to a designated beneficiary. *Cert.* page 7. Monies accumulated in the CREF certificate may be transferred to a TIAA contract prior to the annuity starting date. *Cert.* page 9.

CONCLUSIONS OF LAW

Section 541(a)(1) provides, with limited exceptions, that the debtor's estate is compromised of "all legal and equitable interest of the debtor in property at the commencement of the case." This section is very expansive in its reach and clearly emphasizes the Congressional intent that all kinds of property be included in the estate, even that needed for a fresh start. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 823, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5868. The only exception to this broad concept of property of the estate is 11 U.S.C. § 541(c)(2) which states:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C. § 541(c)(2).

It is the position of the debtors that the money in the CREF account, pursuant to § 541(c)(2) is not property of the estate, as it is a trust enforceable under non-bankruptcy law, that is, a spendthrift trust. Conversely, the trustee asserts that the CREF account is an ERISA[1] pension plan that is included as property of the estate.

Recently, the Court of Appeals for the Eighth Circuit handed down a decision concerning the application of § 541(c)(2) to a debtor's interest in a teacher retirement plan. *In re Swanson*, 873 F.2d 1121 (8th Cir. 1989). This case analyzed the retirement plan in light of the Eight Circuit's holding *In re Graham*, 726 F.2d 1268 (8th Cir. 1984). The *Swanson* case involved a teacher retirement plan created by Minnesota statute, and thus was governed by Minnesota law. Membership in the plan was

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1. Employee Retirement Income Security Act of 1974; for ERISA qualifications, see 29 U.S.C. § 1056 and 26 U.S.C. § 401.

mandatory of all public school teachers. Funds in the plan were accumulated by mandatory employee and employer contributions. The Minnesota statute that created the retirement plan also contained many restrictions on the right of a teacher to assign or transfer that teacher's interest in the plan. The Minnesota statute provided that "all monies to the credit of a teacher's account in the fund . . . shall belong to the State of Minnesota until actually paid to the teacher or his beneficiary pursuant to the provisions of this chapter." *Swanson* at 1122-3 (citing Minn. Stat. § 354.10 (1982)).

The *Swanson* court held that the plan was not a valid spendthrift trust under Minnesota law in spite of the many restrictions on alienation. This holding was based on two grounds. First, since a teacher who was also a beneficiary made contributions to the plan, it was considered self-settled. A self-settled trust violated Minnesota's common law which holds that where the settlor of a trust and beneficiary of a trust are the same person, then the trust is not a spendthrift trust. Second, the *Swanson* court noted that the teacher participants were able to exercise dominion and control over the monies in the fund in that they were entitled to certain refunds upon termination of employment. *Swanson* at 1124.

Prior to *Swanson*, *In re Graham*, 726 F.2d 1268 (8th Cir. 1984), might have been read to hold that ERISA type retirement plans were never to be included under 11 U.S.C. § 541(c)(2) since Congress provided for them in the exceptions list of 11 U.S.C. § 522(d)(10).[2] However, the *Swanson* court made it clear that the Eighth Circuit would consider an ERISA plan if it met all the characteristics of a traditional spendthrift trust, as

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2. "There is no indication whatever that Congress intended § 541(c)(2) to be a broad exclusion which would apply to all debtors' entire ERISA plan benefits out of the estate. To the contrary, pension benefits are specifically treated under the Code's *exemption* provision, clearly indicating that they were intended and assumed to be part of the estate." *In re Graham* at 1272.

it stated: "Nevertheless, we do not intend to state a broad rule that monies in any statutory trust are not excluded from the bankruptcy estate under § 541(c)(2)." *Swanson* at 1124.

A bankruptcy court within the eighth circuit has recently decided the very same issue as is before this Court, *In re Daniel Patrick Montgomery*, No. L88-00313C slip op. (Bankr. N.D. Iowa, June 8, 1989). The Honorable Michael J. Melloy, Chief Bankruptcy Judge, Iowa, considered a CREF annuity in light of the Eighth Circuit decisions and New York law concerning spendthrift trusts. Judge Melloy held that the CREF annuity was a traditional spendthrift trust under the laws of New York and that pursuant to 11 U.S.C. § 541(c)(2) the certificate was not property of the debtor's estate. *Montgomery*, slip op. at 15. *See, also In re Braden*, 69 B.R. 93 (Bankr. E.D. Mich. 1987) (finding that New York law was to be applied in interpreting a TIAA/CREF annuity, and holding that the annuity was not property of the estate pursuant to 11 U.S.C. § 541(a)(2); *In re J.D. Woodward*, No. 3-86-03344(3)7 (W.D. Ken., July 21, 1988) (finding that under New York law the two plans constituted spendthrift trusts and holding that the property was not property of the debtor's estate).

All of the courts cited *supra* in considering the nature of CREF relied upon two leading New York cases regarding the spendthrift nature of TIAA and CREF. In *Alexandre v. Chase Manhattan Bank, N.A.*, 403 N.Y.S. 2d 21 (N.Y. App. Div. 1978), the court considered a TIAA plan. A former spouse, now a judgment creditor, asked the court to permit her to invade the pension fund to satisfy her judgment. The Court in *Alexandre* found that the judgment-debtor had nothing more than a contingent interest, which would be paid monthly at the starting date of the annuity. The Court emphasized that the contract could not be surrendered nor assigned and held that the pension funds were beyond the reach of the creditor.

In *Aurora G. v. Harold Aaron G.*, 414 N.Y.S. 2d 632 (N.Y. Fam. Ct. 1979), the nature of a CREF plan was specifically

examined. The *Aurora G.* court followed the *Alexandre* decision, and held that the petitioning creditor could not reach the CREF annuity. The *Aurora G.* court emphasized that CREF was created by special act of the New York Legislature, and the non-assignment language within the act controlled.[3] This enabling act, creating CREF, has the following anti-assignment and anti-attachment language:

> No money or other benefit provided or rendered by the corporation hereby formed, nor any rights or interests of any participating person in any benefit provided by said corporation, or any beneficiary of any such person, or of any others who may have a right derived from any such person or beneficiary, shall be subject to assignment or pledge, or be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of any such person, or of any beneficiary of any such person, or of any others who may have a right under any such person or beneficiary.

1952 N.Y. Laws Cl. 124, § 9.

The cases of *Aurora G.* and *Alexandre* established that under the laws of New York, the CREF plans were unavailable to creditors. The CREF certificate before this Court has the same

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3. *See In re Rodrequiz*, 82 B.R. 74 (Bankr. W.D. Ark. 1987), which involved a factual situation interpreting an employer sponsored savings plan known as Harsco Corporation Savings Plan. The Honorable James G. Mixon, Bankruptcy Judge, Arkansas, in applying Pennsylvania law, determined that the plan did not qualify as a valid spendthrift trust under Pennsylvania law because the debtor had the power to receive the trust corpus at his discretion and the plan funds were assignable.

general anti-assignment language as the CREF certificates analyzed by the other courts cited above. Significantly, the CREF certificate in issue relies upon the New York enabling statute for protection from creditors as Paragraph 36 states that "the benefits and rights accruing to you or any other person under this certificate are exempt from the claims of creditors or legal process to the fullest extent permitted by law. This protection is contained in the statute of the State of New York establishing CREF." By incorporating by reference the New York statute creating CREF, the CREF certificate in issue contins the same spendthrift language as the CREF certificates in *Aurora G.* and *Montgomery*. This Court is persuaded and is controlled by the New York courts, which in applying their trust law to these certificates find them immune to creditors. Further, this Court is persuaded by another line of cases considering the CREF certificates and the provision concerning no cash surrenders. See, *Connick v. Teachers Ins. and Annuity Assn.*, 784 F.2d 1018, 1020-21 (9th Cir. 1986) and cases cited therein. In every case, the courts determined that the contracts did not provide for lump sum payments, and thus even the annuitants were unable to reach the monies in the contracts. *Id.*

This Court, as did the New York courts in *Aurora G.* and *Alexandre* and the bankruptcy courts in *Montgomery* and *Braden*, holds that the CREF certificate, because of the language in the New York statute, is a spendthrift trust. Therefore, this Court finds that the restrictions stated in the annuity plan are enforceable under New York law and are thus excludable from the estate pursuant to 11 U.S.C. § 541(c)(2).

An Order of even date consistent with this Memorandum opinion shall be issued.

/s/ Robert F. Fussell
ROBERT F. FUSSELL
UNITED STATES
BANKRUPTCY JUDGE

DATE: /s/ September 18, 1989

cc: Mary Winzerling, Esq.
P.O. Drawer 3456
Fayetteville, AR 72702

Marion Wagner, Esq.
121-A South Second Street
Rogers, AR 72756

APPENDIX B

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF KENTUCKY

IN RE:)
)
J. D. WOODWARD)
)
Debtor) CASE NO. 3-86-03344(3)
A.P. NO. 3-87-0036

WILLIAM STEPHEN REISZ,
TRUSTEE PLAINTIFF

VS.

J. D. WOODWARD, ET AL. DEFENDANT

MEMORANDUM-OPINION

The issue before the Court in this adversary proceeding is whether the debtor's interests in three retirement programs available through the University of Louisville ("U of L") constitute property of the bankruptcy estate under 11 U.S.C. 541. The issue ws submitted for the Court's decision after the Trustee, Wm. Stephen Reisz, filed a complaint for turnover of certain funds in the possession of the Teachers Insurance and Annuity Association-College Equity Fund ("TIAA-CREF") and Fidelity Investments ("Fidelity"). By Order entered Setpember 14, 1987, this Court requested that counsel for the parties involved file and stipulate as to authenticity, content, and purpose all documents which form the basis for any contract or agreement between the debtor, James M. Woodward, and TIAA-CREF or Fidelity regarding pension, retirement or any other funds held on the debtor's behalf. In complaince with that Order, a stipulation as to the TIAA-CREF documents and briefs were submitted by attorneys for TIAA-CREF, the bankruptcy trustee, and the debtor. However, neither stipulation nor briefs

were submitted as to the Fidelity documents. Consequently, the Court has no evidence by which it can determine whether funds held by Fidelity constitute property of the estate. This memorandum opinion will consider the issue only as it relates to the funds held by TIAA-CREF. An outline of the facts is set forth below.

The debtor, Dr. J. D. Woodward, is a professor at the U of L School of Denistry. He participates in U of L's retirement program as a condition of his employment. Under the plan, the School of Denistry withholds five percent (5%) of his annual base salary for contribution to one or more of three investment funds. Accordingly, the University contributes on the employee's behalf an amount equal to ten percent (10%) of his annual base salry to the fund or funds selected by the employee. In this case, the debtor chose to participate in two of three available plans, TIAA-CREF and Fidelity. As stated previously, this decision limits its scope to the status of funds invested with TIAA-CREF.

As of the date the bankruptcy petition was filed, TIAA-CREF's records reflected an accumulation of $33,834.10 in the TIAA fund and $149,032.15 in the CREF account. To determine whether the accumulated values become property of the estate, it is necessary to carefully analyze the provisions of the plan documents. The TIAA contract and the CREF certificate filed by the parties clearly state that there is no provision for cash surrender or loans and that neither document can be assigned. Although both agreements provide that the annuitant purchases a fully paid share in the respective funds, the right to receive payment under the plan is limited to the occurence of certain events. Thus, the debtor can receive the annuity payments only upon retirement or termination of employment from the University. His beneficiaries may be entitled to receive death benefits if the debtor dies before his designated retirement date.

Most pertinent to this Court's analysis are the anti-alienation and no-assignment clauses contained in the TIAA contract and the CREF certificate. The language of the two agreements vary

only slightly. Paragraph 16 of the TIAA contract protects the fund against claims of creditors as follows:

> The benefits, options, rights, and privileges accruing to any Beneficiary will not be transferrable or subject to surrender, commutation, or anticipation, except as may be otherwise endorsed on this contract. To the extent permitted by law, annuity and other benefit payments will not be subject to the claims of any creditor of any Beneficiary or to execution or to legal process.

Similarly, the CREF certificate refers to its enabling statute which provides that no money or other benefit from or rendered by the corporation, nor any rights or interest of any participating person in any benefit provided by the corporation shall be subject to assignment, pledge, attachment, garnishment or other process or be seized, taken, appropriated or applied by any operation of law to pay any debt or liability of any such person. L. 1952, Chapter 124, Sec. 9.

In addition, the TIAA-CREF documents specify that the debtor has no present right to withdraw any of the accumulated funds. When the debtor signed the agreements in May of 1970, he elected to begin receiving annuity payments at his anticipated retirement date, December 1, 2001, at which time he will be 65 years old. Because the debtor has participated in the program for more than five years, he holds no right to repurchase his contract, even if he leaves the teaching profession altogether. U of L's Retirement Handbook states that after the five-year period lapses, the employee's and the University's money, plus accrued interest, is "locked in" until retirement.

Keeping the plan's provisions in mind, the Court's analysis shifts to the applicable law. The issue for determination is whether the debtor's retirement accounts constitute property of the estate under Section 541(a) of the Bankruptcy Code or whether they are excluded under Section 541(c)(2). As ex-

pected, the Trustee maintains that the first contention is true while the TIAA-CREF counsel argues the latter. The Trustee correctly points out that this Court previously recognized that the bankruptcy estate is to be broadly defined in accordance with Section 541(a). *In re Slezak*, 63 B.R. 625, 627 (Bkrtcy. W.C. Ky. 1986). However, 541(c)(2) establishes an exception: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable bankruptcy law is enforceable in a case under this title."

In *Slezak, supra.*, this Court examined the Congressional intent behind Section 541(c)(2) and concluded that only a classic spendthrift trust is excluded from the bankrupt's estate. *Id.* at 628. The Trustee, in turn, maintains that the instruments which fund the retirement accounts are not trusts but annuity agreements which create a debtor-creditor relationship. This Court is not so persuaded. The debtor's "interest" is merely a right to receive payments in the future contingent upon the occurrence of certain events. See *In re Braden*, 69 B.R. 93, 94 (Bkrtcy. E.D. Mich. 1987). Further, the debtor has no right to withdraw the funds or use the accounts as collateral so long as he remains employed. Therefore, the Court must refer to "applicable nonbankruptcy law" to determine whether the pension funds are spendthrift trusts. *In re Slezak, supra.* at 628. In this case, the applicable nonbankruptcy law is the state trust law of New York, as provided by the TIAA-CREF contracts.

New York Estates, Powers and Trusts Law § 7-1.5.(a)(1) (McKinney 1988) states:

> The right of a beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust.

Clearly, the statutory law of New York recognizes the existence and enforceability of spendthrift trusts. Indeed, one New York court has already recognized the enforceability of the anti-alienation, garnishment, and assignment provision of the TIAA-CREF documents. *Alexandre v. Chase Manhattan Bank, N.A.*, 403 N.Y.S.2d 21, 61 A.D.2d 537 (1978). Under New York law, the provisions of the TIAA-CREF documents effectively restrict the debtor/beneficiary's ability to transfer his interest in the accounts and also preclude the beneficiary's creditors from reaching the funds. This Court finds that the contrracts are valid spendthrift trusts for the purposes of Section 541(c)(2).

The Court rejects for two reasons the Trustee's argument that the debtor/beneficiary is also the settlor and therefore unable to find his own spendthrift trust. First, the Trustee relies on a provision of the Kentucky spendthrift trust statute which is not controlling. Second, the debtor is a plan participant and therefore a contributor solely as a condition of his employment. This Court agrees with the statements found in *In re White*, 61 B.R. 388, 393 (Bkrtcy. W.D. Wash. 1986): "Pension funds are not self-settled merely because they are funded in part by employee contributions or by funds contributed by the employer as compensation for employment." Such plans "funded as a necessary incident of employment. . .are voluntary only in the sense that the employee voluntarily remains an employee." *Id.* at 393.

At this juncture, the Court must point out that the cases cited by the parties herein concern different retirement plans with varying provisions on alienation and transferrability. Consequently, each case must be examined on its own facts. In view of the facts and circumstances of the present case, the Court concludes that the debtor's interests in the TIAA-CREF funds are not property of the estate under Section 541(a). The Trustee's complaint against TIAA-CREF is necessarily dismissed. However, the Court must reserve its ruling with respect to the funds held by Fidelity investments.

This memorandum opinion constitutes findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

An Order consistent with this opinion will be entered this day.

A copy of the foregoing was mailed to David Stosberg, Counsel for Debtor, 2600 Citizens Plaza, Louisville, Kentucky 40202, Michael A. Duncan, 505 Turfway Ridge Office Park, 7300 Turfway Road, Florence, Kentucky 41042, Wm. Stephen Reisz, Trustee, 426 West Jefferson Street, Louisville, Kentucky 40202.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

IN RE:

J.D. WOODWARD,
Debtor, Case No. 3-86-03344 (3) 7

WILLIAM STEPHEN REISZ,
Trustee, Appellant, CIVIL ACTION

v. C 88-0161-L(A)

TEACHERS INSURANCE & ANNUITY
ASSOC. COLLEGE RETIREMENT EQUITIES
FUND,
Appellee.

ORDER OF AFFIRMANCE

This matter having come before the Court on appeal from the United States Bankruptcy Court for the Western District of Kentucky, and the Court having entered its memorandum opinion and being advised,

IT IS ORDERED that the decision of the United States Bankruptcy Court is affirmed insofar as it determined that the plans in issue were excluded from the bankruptcy estate pursuant to 11 U.S.C. Sec. 541(c)(2).

This is a final order.

Dated /s/ 6-24-88

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

ENTERED
JUN 24 1988
JESSE W. CRIDER, CLERK
By DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

IN RE:

J.D. WOODWARD,
Debtor, Case No. 3-86-03344 (3) 7

WILLIAM STEPHEN REISZ,
Trustee, Appellant, CIVIL ACTION

v. C 88-0161-L(A)

TEACHERS INSURANCE & ANNUITY
ASSOC. COLLEGE RETIREMENT EQUITIES
FUND,
Appellee.

MEMORANDUM OPINION

This action comes before the Court on appeal from the judgment of the Bankruptcy Court entered on the 16th day of February, 1988. The question presented on appeal is whether the debtor, Dr. J.D. Woodward, who owned interests in retirement programs offered through the University of Louisville, was entitled to have these interests excluded from his bankruptcy estate. The Bankruptcy Court determined that the interests were excludable. We affirm the result.

Dr. Woodward is a professor at the University of Louisville School of Denistry who participates in the University's retirement program as a condition of his employment. Under the program, the School of Denistry withholds five percent of his annual base salary for contribution to one or more of three investment funds. The University contributes to the funds selected by the employee an amount equal to ten percent of the

employee's annual base salary. This case concerns debtor's participation in one of the three available plans, administered by Teachers Insurance and Annuity Association-College Retirement Equity Fund (TIAA-CREF).

At the time of the filing of the bankruptcy petition, TIAA-CREF's records reflected an accumulation of $33,834.10 in the TIAA Fund and $149,032.15 in the CREF Fund. To determine whether these accumulated values became property of the estate, it is necessary to carefully analyze the provisions of the plan documents. Both the TIAA contract and the CREF certificate clearly state that there is no provision for cash surrender or loans, and that neither document can be assigned. Both agreements provide no present right to withdraw accumulated funds, and provide that the participating employee can receive annuity payments only upon retirement or termination of employment from the University. His beneficiary may receive those benefits if he dies before his designated retirement date.

Paragraph 16 of the TIAA contract states as follows:

> The benefits, options, rights and privileges accruing to any beneficiary will not be transferrable or subject to surrender, commutation or anticipation except as may be otherwise endorsed on this contract. To the extent permitted by law, annuity and other benefit payments will not be subject to the claims of any creditor of any beneficiary or to the execution or to legal process.

The CREF certificate refers to an enabling statute which provides that no money or other benefit from or rendered by the corporation nor any rights or interests of any participating person in any benefit provided by the corporation shall be subject to assignment, pledge, attachment, garnishment, or other process or be seized, taken, appropriated or applied by any

operation of law to pay any debt or liability of any such person. See New York Law, L-1952, Chapter 122, Section 9.

When the debtor signed the TIAA-CREF agreement in May of 1970, he elected to begin receiving annuity payments as of December 1 in the year 2001, at which time he will be sixty-five years old. Since he has already participated in the program for more than five years, he has been barred by the University of Louisville Retirement Handbook from receiving any money from the plan until the date of his retirement.

Section 541(a) of the Bankruptcy Code requires the inclusion in the estate of all property in which the debtor has a legal or equitable interest at the commencement of the case. The section is very broad in its reach and clearly emphasizes the Congressional intent that all kinds of property be included in the bankrupt's estate, even that needed for a fresh start. See *In Re: Slezak*, 63 B. R. 625 (Bankr.Ct., W.D.Ky. 1986); see also Sen. Rpt. No. 95-989, 1978 U.S. Code Cong'l. & Admin. News 5787 at 5868.

Section 541(c)(1) clearly states that restrictions on transfer that appear in "any provision in an agreement, transfer instrument, or applicable nonbankruptcy law" are insufficient to prevent an interest of the debtor from becoming property of the estate.

However, Section 541(c)(2) provides as follows:

> A restriction on the transfer of the beneficial interest of the debtor in a trust that is unforceable under applicable non-bankruptcy law is enforceable in a case under this title.

In *Hovis v. Wright*, 751 F.2d 714 (4th Cir. 1985), the court was asked to address both Sec. 541(a) and Sec. 541(c)(2). The Bankruptcy Court had held that the debtor's contributions to a state school teacher's retirement system were nonexempt property of the estate. The district court reversed, holding that the funds were property of the estate, but they were exempt under

Sec. 541(c). The appellate court held that it was unnecessary for it to reach the question of whether the contributions were property of the estate under Sec. 541(a)(1), in view of its determination that the contributions were exempt from the bankruptcy estate because of governing South Carolina law exempting certain property from attachment, levy, and sale. We agree that this is a logical manner of proceeding, and we do not decide whether the retirement funds would be considered property of the estate.

The funds are located in New York and the contracts were executed in that state. It is agreed that New York law controls. New York Estates, Powers and Trust Laws, Section 7-1.5(a)(1) McKinney 1988 states as follows:

> The right of a beneficiary of an expressed trust to receive the income from property and apply it to the use [of] or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right or any part thereof is conferred upon such beneficiary by the instrument creating or declaring the trust.

A second important provision of New York statutory law is the CREF enabling status, mentioned earlier. That enabling statute contained separate restrictions on alienability.

A Bankruptcy Court found that the pension funds were in essence spendthrift trusts under the law of New York, as Sec. 7-1.5(a)(1) was interpreted in the case of *Alexandre v. Chase Manhattan Bank, N.A.*, 403 N.Y.S.2d 21, 61 A.D.2d 537 1078), which involved, inter alia, a TIAA plan. *Alexandre* involved a former spouse's request to satisfy a judgment for alimony and child support arrearages by invading the principal of trust funds in which the respondent had an equity. In rejecting her claim to the TIAA funds, the Court quoted from *Cohen v. First National Bank*, 49 Mis[c].2d 141, 267 N.Y.S.2d 146, as follows: "... the critical test is whether the judgment debtor has an interest which

he might reach ... only that interest may be reached by his creditor, and only at the time and to the extent that it is ripe." Since the debtor had no interest that he could reach before retirement age, the Bankruptcy Court held that the contracts constituted excludable spendthrift trusts under New York law.

The nature of TIAA and CREF plans was examined again in the case of *Aurora G. v. Harold Aaron G.*, 98 Misc. 2d 695, 414 N.Y.S.2d 632 (1979), and a difference in the manner of receiving benefits was held to require a different result. The court agreed that the CREF enabling statute was determinative and placed that plan beyond the reach of creditors. However, the beneficiary had begun receiving payments under the TIAA plan prior to the litigation. Noting this fact, and the fact that TIAA, unlike CREF, was not created by special legislation, the *Aurora G.* court held that the terms of the TIAA contract, standing alone, did not insulate the currently due benefits from creditors.

In view of *Alexandre* and *Aurora G.*, we believe it significant that in our present case there is substantial support for the Court's finding concerning right to receive benefits. The Court found that no benefit payments are currently due, and debtor has no present right to the funds.

The appellant contends that the Bankruptcy Court's opinion is erroneous and contrary to the decisions in the cases of *In Re: Graham*, 726 F.2d 1268 (8th Cir. 1984), and *Regan v. Ross*, 691 F. 2d 81 (2d Cir. 1982). *Regan, supra*, involved the question of systems to transfer a portion of their monthly benefits for distribution to creditors under Chapter 13 of the Bankruptcy Code. The pension beneficiaries participated in a state pension system set up in New York under a New York statute which provided that state pension benefits should not be subject to execution, garnishment, attachment or any other process, and should be unassignable. N.Y. Retire & Soc. Sec. Law Sec. 110 (McKinney 1971).

The *Regan* court took the position that Chapter 13 of the new Bankruptcy Code contemplated that pension benefits would be used to make repayment plans with the Chapter 13 creditors

rather than the debtor being forced into straight bankruptcy. See *Regan, supra*, at 85. In light of the language in *Cohan*, quoted above, we belive it is highly significant that the pensioners in *Regan* had present access to the monthly benefits in issue.

The *Regan* court went on to hold that the pension funds under the New York retirement system should not be granted automatic exemption under Section 541(c)(2). On page 86 of its opinion, the *Regan* court did not explicitly decide whether or not the pension funds were "spendthrift" in form. Instead, the *Regan* court emphasized the need of the pensioners to have access to their pension funds in order to consummate a Chapter 13 plan. The court also emphasized 11 U.S.C. 522(d)(10)(E), which provides that "A debtor may exempt from estate property 'a payment under a ... pension ... plan or contract on account of illness, disability, death, age, or length of service.'" The court pointed out that this would indicate that pension benefits were meant to be the property of the estate and that the debtors did not wish an exemption "but rather proposed inclusion of the pension benefits in their voluntary Chapter 13 plans.

In footnote 14 on page 86, the *Regan* court noted that the New York Court of appeals in *Caravaggio v. Retirement Bd.*, 329 N. E.2d 165, 169 (1975), has stated that a state pension plan "is not unlike a spendthrift trust, except that it is stronger in purpose by virtue of statute and Constitution." In *Caravaggio*, the court held that a deceased pensioner had the right to name his second wife as a death beneficiary after he had irrevocably assigned his pension rights to his first wife pursuant to a separation agreement. There, the court held that the "first assignment could not be honored because this would be contrary to the state's policy of preserving unfettered a pensioner's right to designate a beneficiary."

In Re: Graham, supra, notes that traditional spendthrift trusts under state law are not to be included in a bankruptcy estate but holds that there is no automatic exemption for pensions created under ERISA even though ERISA-created pensions contain anti-alienation clauses. This conforms to the

holding in *Slezak, supra*, which held that anti-alienation clauses do not constitute a shield where the equitable owner has some rights of present access.

Directly contrary to *Regan, supra*, and *In Re: Graham*, is the case of *McLean v. Central States, S. & S. Areas Pension Fund*, 762 F. 2d 1204 (4th Cir. 1985). The court held there that where the debtor was a pensioner under an ERISA qualified fund which necessarily contained an anti-assignment provision preventing alienation of benefits by the beneficiary, there was created a spendthrift trust under Illinois law. The court in *McLean, supra*, pointed out that contributions to the fund were made only by employers, and employees had no power to revoke the trust and reach its corpus.

The *McLean* court rejected the arguments which were accepted by the courts in *In Re: Graham* and *Regan v. Ross* to the effect that because pension interests are made subject to exemptions under 11 U.S.C. 522(d)(10)(E), they necessarily must be estate property under 541(a)(1). The *McLean* court held that "whether a particular pension fund interest subject to transfer restrictions is initially included in estate property is wholly determined by whether, per § 541(c)(2), the restriction is enforceable under applicable nonbankruptcy law, including any public policy concerns that might make unenforceable a restriction in a pension plan settled and revocable by a beneficiary." Citing *Goff v. Taylor (In re Goff)*, 706 F. 2d 574, 586-89 (5th Cir. 1983).

We note with interest that both *McLean* and *In Re: Graham* cite with approval *In re Goff*. *In re Goff* holds that Section 541(c)(2) is intended to exempt only spendthrift trust assets from the bankrupt estate. It holds, however, that a self-settled Keogh plan was not subject to exemption and became part of the bankrupt's estate under 541(c)(2). The basis for the opinion is that the plan did not qualify as a spendthrift trust under state law.

We believe that the approach in *Goff* is the correct one, and that the basic question is whether or not the two funds in issue here qualify as spendthrift trusts under New York law.

The case of *In re Braden*, 69 B.R. 93 (Bankr. Ct., E.D. Mich. 1987) addressed precisely this issue. Like the court in *Hovis, supra*, the *Braden* judge held that it was unnecessary to determine whether the debtor's rights in the TIAA and CREF plans constituted property of the estate under Sec. 541(a)(1). Reading *Alexandre, supra*, as direct authority for the proposition that these plans are considered spendthrift trusts under applicable New York law, the court ruled that they were exempt pursuant to Sec. 541(c)(2). The Bankruptcy Court also observed that other cases, including *In re Goff, supra*, were distinguishable because of differences in the types of retirement plans in issue. We believe that this observation, echoed by the Bankruptcy Court in the present case, is central to an understanding of apparent conflicts in the cases.

We believe that the Bankruptcy Court correctly held in this case that under New York law the two plans constituted spendthrift trusts. We recognize that *Regan* reaches a different result than that reached by the Bankruptcy Judge in the case at bar but note that the *Regan* court was there concerned with the wish of the debtor to include the pension benefits in his estate under Chapter 13, and also that the *Regan* court did not specifically reach the question of whether or not the state retirement plans in issue there constituted spendthrift trusts under New York law.

As the debtor in this case had no present right to reach the funds in question or to revoke the trusts, as the trusts were not self-settled, and in view of the governing contracts and New York law, we detect no error in the Bankruptcy Court's findings of fact or conclusions of law, and we must affirm the decision on the basis of Sec. 541(c)(2). We need not reach the question of inclusion under Sec. 541(a)(1). An order in conformity has this day entered.

Dated /s/ 6-24-88

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

SUPREME COURT, U.S.
FILED
DEC 26 1991
OFFICE OF THE CLERK

No. 91-884

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FARM CREDIT SERVICES, PETITIONER,

v.

RAYMOND L. MORTER, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This is a bankruptcy proceeding involving the exclusion of a debtor's retirement plan from the bankruptcy estate. The questions presented are:

1. Whether a debtor's interest in a retirement plan is excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2) when the retirement plan has restrictions on transfer that are enforceable under the applicable state spendthrift trust law.

2. Whether a debtor's interest in a public university's Teachers Insurance and Annuity Association retirement plan is excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2) when the debtor has made no voluntary contributions to the retirement plan and the absolute restrictions on alienation are enforceable under New York law, the applicable nonbankruptcy law.

LIST OF PARTIES

As a supplement to the List of Parties contained in the Petition for Writ of Certiorari, respondent states that Raymond L. Morter d/b/a Swinengineering, Inc. has no parent companies or subsidiaries.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

FARM CREDIT SERVICES, PETITIONER,

v.

RAYMOND L. MORTER, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Raymond L. Morter, by counsel, pursuant to Rule 15, Rules of the United States Supreme Court, respectfully submits this brief in opposition to the petition for writ of certiorari seeking review of the Seventh Circuit's opinion in this case. *Morter v. Farm Credit Services*, 937 F.2d 354 (7th Cir. 1991).

JURISDICTION

Petitioner, Farm Credit Services, applied to Justice Stevens for an extension of time within which to file a petition for writ of certiorari on September 27, 1991. Justice Stevens signed an order on September 30, 1991 extending the time. Justice Stevens allowed up to and including November 28, 1991 to file a petition for a writ of certiorari.

STATUTE INVOLVED

11 U.S.C. § 541(c)(2) provides:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

STATEMENT OF THE CASE

Respondent, Raymond L. Morter, served as a professor of veterinary science at Purdue University for more than thirty years. As a condition of his employment at Purdue, Morter was required to participate in the university's retirement plan, the Teachers Insurance and Annuity Association of America/College Retirement Equities Fund ("TIAA-CREF"). Although a participant may make voluntary payments to the plan, Morter did not do so; Purdue paid all preretirement contributions on his behalf. Pet. App. 6, 23, 32.

Purdue University's TIAA-CREF plan makes "no provision for cash surrender or loans and cannot be assigned." The TIAA portion of the plan specifically provides:

> 16. *No assignment.* Any assignment or pledge of this contract or of any benefit hereunder will be void and of no effect.
>
> 17. *Protection Against Claims of Creditors.* The benefits, options, rights, and privileges accruing to any Beneficiary will not be transferable or subject to surrender, commutation, or anticipation, except as may be otherwise endorsed on this contract. To the extent permitted by law,

> annuity and other benefit payments will not be subject to claims of any creditor of any Beneficiary or to execution or to legal process.

Clause 17 of the CREF component of the plan contains similar language protecting benefits against the claims of creditors. Pursuant to these provisions, Morter had no access to the accumulation of assets in Purdue University's TIAA-CREF retirement plan short of retirement or death. Pet. App. 7, 24 n.1, 33-34.

Morter filed a voluntary petition for relief pursuant to Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (1978). Morter listed his interest in the TIAA-CREF retirement plan as exempt. The United States Trustee and petitioner, Farm Credit Services, objected to the claimed exclusion of the TIAA-CREF retirement plan. The bankruptcy court applied Indiana law and ruled that the TIAA-CREF retirement plan was property of the bankruptcy estate. Morter was entitled to exempt only $100 pursuant to Ind. Code § 34-2-28-1(a)(3). Pet. App. 3-21.

Morter appealed to the district court. The district court first examined the legislative history of 11 U.S.C. § 541(c)(2) and determined that Congress intended to exclude only "traditional" spendthrift trusts, not retirement plans that exhibit the characteristics of spendthrift trusts. Applying New York law, the district court held that the CREF component was excluded from the bankruptcy estate, but that the TIAA component was included in the bankruptcy estate. Pet. App. 22-31.

Morter appealed the decision regarding the TIAA portion of the retirement plan; Farm Credit Services did not cross-appeal the district court's decision to exclude the CREF component. The Seventh Circuit held that 11 U.S.C. § 541(c)(2) was not limited to "traditional" spendthrift trusts: "the plain language of section 541(c)(2) does not require that a retirement plan be a 'traditional' spendthrift trust." Pet. App. 37. The court of

appeals noted that four unanimous prior decisions had excluded the TIAA retirement plan from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2) and two New York decisions had held that the anti-alienation provision of TIAA was enforceable under New York law. Pet. App. 38. The Seventh Circuit stated:

> The proper inquiry under section 541(c)(2), then, is not whether the accumulated funds are in a "traditional" spendthrift trust, but whether the retirement plan bars the beneficiary and his creditors from reaching the funds. If it does, the plan is tantamount to a spendthrift trust.

Pet. App. 38. The court of appeals excluded the TIAA portion of the retirement plan from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2); the Seventh Circuit found no need to address Morter's argument that Indiana's recently amended exemption statute, Ind. Code § 34-2-28-1(a)(6) (1990), prohibited levy or execution of the TIAA retirement plan. Pet. App. 41.

The following paragraph from the petition is not part of the record on appeal:

> At the time Respondent filed his Chapter 7 bankruptcy petition, he was indebted to Petitioner by virtue of a promissory note and mortgage executed on or about December 17, 1980. The original note was made by the Federal Land Bank of St. Paul to Respondent, R. William Morter and Carol A. Morter in the original sum of $300,000.00. Subsequent to the abandonment of the real estate securing this debt, the foreclosure of the mortgage and sale of the real estate, Respondent remains indebted to Petitioner in the sum of $66,293.48.

Pet. 5. The Court should not consider these statements because they are not of record.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for writ of certiorari for three reasons. First, the Seventh Circuit's decision does not create a conflict with a decision from another federal court of appeals. Although some prior decisions contain inconsistent dicta, the Seventh Circuit pointed out that the decisions expressed a willingness to exclude an employer-created-and-controlled retirement plan that is analogous to a spendthrift trust. Pet. App. 37-38. All the federal courts of appeals agree with the Seventh Circuit that the phrase "applicable nonbankruptcy law" in 11 U.S.C. § 541(c)(2) includes, at least, state spendthrift trust law. Pet. App. 34.

Second, the Seventh Circuit applied New York spendthrift trust law to exclude the TIAA retirement plan from the bankruptcy estate. The Employee Retirement Income Security Act of 1974 ("ERISA") could not be the "applicable nonbankruptcy law" in this case because Purdue University, as a public institution, is expressly exempted from the federal statute. Under New York law, however, the restrictions on transfer in the TIAA retirement plan have been specifically held to be enforceable. Four prior bankruptcy decisions unanimously relied upon *this* New York law to specifically exclude other institutions' TIAA-CREF retirement plans. Every prior decision involving TIAA-CREF excluded both components of the retirement plan from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2).

Third, the Seventh Circuit's decision is consistent with the statute itself. The plain statutory language of 11 U.S.C. § 541(c)(2) does not require that a retirement plan be a "traditional" spendthrift trust. Pet. App. 37. The starting point for construing a federal statute must be the literal language of the

statute itself. The district court misplaced its reliance on the legislative history of 11 U.S.C. § 541(c)(2) in derogation of the clear statutory language. The Seventh Circuit corrected the district court's error and applied the plain language of the statute.

I.
THE DECISION OF THE SEVENTH CIRCUIT IS NOT IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS.

Petitioner asserts that the Seventh Circuit's opinion conflicts with decisions of the Fifth Circuit, the Ninth Circuit, the Eighth Circuit, and the Eleventh Circuit. Pet. 9. No conflict exists. Those decisions concern *self-settled* retirement plans controlled by debtors and they apply state spendthrift trust law as the applicable nonbankruptcy law under 11 U.S.C. § 541(c)(2).

A.
All The Decisions Alleged To Be In Conflict Involved Self-Settled Retirement Plans Controlled by Debtors.

Every case cited by petitioner as conflicting with the Seventh Circuit's decision concerned a self-settled retirement plan. In every case, the debtor funded and controlled the retirement plans thereby defeating the spendthrift nature of the plan. In this case, Purdue University made all preretirement contributions to the TIAA-CREF retirement plan, respondent was required—as a condition of his employment—to be a participant in the TIAA-CREF retirement plan, and Purdue University controlled the TIAA-CREF retirement plan. The cases petitioner cites in conflict are distinguishable.

In cases arising prior to the enactment of the Bankruptcy Code of 1978, courts recognized that spendthrift provisions in employer-created pension plans prevented the benefits from passing to the bankruptcy trustee under Section 70(a)(5) of the

Bankruptcy Act of 1898, 11 U.S.C. § 110(a)(5)(repealed 1978). *See, e.g., In re Turpin*, 644 F.2d 472 (5th Cir. Unit A 1981); *In re Parker*, 473 F.Supp. 746 (W.D.N.Y. 1979). Similar provisions in self-settled plans, however, were not effective in preventing the benefits from passing to the trustee. *See, e.g., In re Witlin*, 640 F.2d 661 (5th Cir. Unit B 1981).

The first court of appeals to consider the application of 11 U.S.C. § 541(c)(2) of the Bankruptcy Code to pension plans, and the case primarily relied upon by petitioner to be in conflict, held that benefits under self-settled Keogh plans were property of the bankruptcy estate. *In re Goff*, 706 F.2d 574 (5th Cir. 1983). The Fifth Circuit explicitly recognized the distinction between, on the one hand, employer-created-and-controlled plans and, on the other hand, self-settled, debtor-created-and-controlled plans:

> In analyzing the effectiveness in bankruptcy of spendthrift provisions in pension plans, the courts have generally concluded that those contained in employer-created plans were effective[,] similar provisions in self-settled plans were not. The latter conclusion is inescapable since . . . the traditional law of spendthrift trusts has rejected the notion of effective spendthrift provisions in self-settled trusts. As to the former, without passing upon the exact limits of plans which could properly be characterized "spendthrift trusts," *the employer-created-and-controlled nature of those plans may well make them analogous to a spendthrift trust.*

Id. at 589 (footnotes omitted)(emphasis added). The Seventh Circuit in this case expressly relied upon the above emphasized language in *Goff* to support its holding. Pet. App. 38. The Seventh Circuit's decision is not in conflict with the Fifth Circuit's decision in *Goff*.

Nor does the Seventh Circuit's opinion conflict with the decisions of the Ninth Circuit cited by petitioner. In one case, the debtor's corporation formed a pension and profit-sharing plan which was managed and controlled by the debtor; the debtor was the sole trustee. *In re Daniel*, 771 F.2d 1352, 1353-1354 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). In another case, the retirement plan was "self settled under Washington law and was not excludable from the bankruptcy estate." *In re Jordan*, 914 F.2d 197, 200 (9th Cir. 1990). These decisions do not conflict with the Seventh Circuit's opinion because Morter's interest in the TIAA retirement plan was not self-settled. Pet. App. 38. Morter did not make voluntary payments to the TIAA retirement plan; Purdue paid all preretirement contributions on his behalf. Pet. App. 6, 23, 32.

Likewise, the Seventh Circuit's decision does not conflict with any decision of the Eighth Circuit or Eleventh Circuit because the retirement plans at issue in those cases were also self-settled. *In re Swanson*, 873 F.2d 1121, 1124 (8th Cir. 1989)(law creating teacher retirement fund included language similar to that found in spendthrift trust, but because debtor-teacher contributed to the fund, the retirement plan was self-settled and would not qualify as a spendthrift trust under Minnesota law); *In re Lichstrahl*, 750 F.2d 1488, 1490 (11th Cir. 1985)(pension plan not a spendthrift trust under Florida law because the debtor "alone enjoys the authority to act, whether as an agent of the settlor or in his own right as trustee and beneficiary"); *In re Graham*, 726 F.2d 1268, 1269 (8th Cir. 1984)(physician's profit sharing retirement plan included in bankruptcy estate when doctor was sole stockholder, director and officer of professional corporation that paid benefits into retirement plan). The Seventh Circuit cited the recent Eighth Circuit case as an example for the following proposition: "Even in cases in which courts have included retirement plans within

the bankruptcy estate, there has been a willingness to exclude the plan if it is employer-created and controlled and, therefore, analogous to a spendthrift trust." Pet. App. 37.

Every appellate court decision cited by petitioner as conflicting can be distinguished by one critical factor—the pension plans were self-settled and controlled by debtors. Because the retirement plans were self-settled and debtor controlled, they could not be analogous to a spendthrift trust under state law.

B.
Every Decision Alleged To Be In Conflict Held That The "Applicable Nonbankruptcy Law" Under 11 U.S.C. § 541(c)(2) Was State Spendthrift Trust Law.

The decisions the petitioner claims to be in conflict with the Seventh Circuit's decision held that state spendthrift trust law was the "applicable nonbankruptcy law" under 11 U.S.C. § 541(c)(2). *Daniel* 771 F.2d at 1360 ("the phrase '*applicable non-bankruptcy law*' in 11 U.S.C. § 541(c)(2) was intended to be a narrow reference to *state* 'spendthrift trust' law and not a broad reference to *all* other laws, including ERISA and IRC, which prohibit alienation"); *Lichstrahl*, 750 F.2d at 1490 ("'applicable nonbankruptcy law' refers only to state spendthrift trust law"); *Graham*, 726 F.2d at 1271 (Congress did not intend "applicable nonbankruptcy law" to include ERISA, only spendthrift trusts recognized by state law); *Goff*, 706 F.2d at 582 ("Congress intended by its reference to 'applicable nonbankruptcy law' to exempt from the estate only those 'spendthrift trusts' . . . beyond the reach of creditors under state law").

The Seventh Circuit's decision does not conflict with the cases cited by petitioner as to what law is the "applicable nonbankruptcy law" for purposes of 11 U.S.C. § 541(c)(2). The court of appeals quoted from 11 U.S.C. § 541(c)(2) and then stated: "Thus, if state law prevents a creditor from reaching

certain income payable at a future date, then the Bankruptcy Code similarly will treat that income as outside the bankruptcy estate and unreachable by creditors." Pet. App. 34. Both the Seventh Circuit and the decisions alleged to be in conflict hold that the phrase "applicable nonbankruptcy law" in 11 U.S.C. § 541(c)(2) refers to state spendthrift trust law.

The only possible conflict in the lower courts, one not presented in this case, is whether the phrase "applicable non-bankruptcy law" in 11 U.S.C. § 541(c)(2) is limited to state spendthrift trust law or whether it also includes federal law, such as ERISA or the Internal Revenue Code. *See In re Lucas*, 924 F.2d 597 (6th Cir.), *cert denied sub nom. Forbes v. Holiday Corp. Savings & Retirement Plan*, 111 S.Ct. 2275 (1991); *In re Moore*, 907 F.2d 1476 (4th Cir. 1990). *Lucas* and *Moore* were cited as supplemental authority in the court below but the Seventh Circuit refrained from discussing whether or not ERISA plans were excluded from the bankruptcy estate because it was reviewing a non-ERISA plan.

The Seventh Circuit held that the phrase "applicable nonbankruptcy law" referred to state spendthrift trust law. Pet. App. 34. The court of appeals did not decide whether the less restrictive anti-alienation provisions required by ERISA, 29 U.S.C. § 1056(d)(1), and the Internal Revenue Code, 26 U.S.C. § 401(a)(13) would be sufficient, of their own force, to exclude a retirement plan from a bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2). The cases petitioner alleges to be in conflict are consistent with the Seventh Circuit's decision.

II.
THE SEVENTH CIRCUIT APPLIED NEW YORK SPENDTHRIFT TRUST LAW TO EXCLUDE PURDUE UNIVERSITY'S TIAA RETIREMENT PLAN.

Petitioner suggests that this case would be an appropriate one to resolve the apparent conflict regarding the interpretation of 11 U.S.C. § 541(c)(2). TIAA, it argues, is a national retirement plan that could be subjected to different results depending on where the retirement plan is located. This argument is misplaced because Purdue University's TIAA plan is governed by New York law, not federal law. This case is not an appropriate one to resolve the apparent conflict.

Purdue University's TIAA-CREF retirement plan is not governed by the Employee Retirement Income Security Act of 1974 ("ERISA") in that the university is a public institution. 29 U.S.C. §§ 1002(32), 1003(b)(1). The apparent conflict petitioner has asserted—whether the phrase "applicable nonbankruptcy law" in 11 U.S.C. § 541(c)(2) includes ERISA—is not presented in this case and was not decided by the Seventh Circuit.

Furthermore, TIAA's restrictions on alienation are enforceable under New York law. *Matter of Aurora G. v. Harold Aaron G.*, 98 Misc. 2d 695, 414 N.Y.S. 2d 632 (1979); *Alexandre v. Chase Manhattan Bank*, 61 A.D. 2d 537, 403 N.Y.S 2d 21 (1978). This Court stated, "As to questions controlled by state law, however, conflict among the circuits is not itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938).

The Seventh Circuit reviewed New York statutory and case law. Pet. App. 39-40 (citing N.Y. Est. Powers & Trust Law § 7-1.5(a)(1) (McKinney 1988); *In re Guardianship of Dugan*, 29 Misc. 2d 980, 982, 222 N.Y.S. 2d 831, 833 (1961)). *See also*,

N.Y. Est. Powers & Trust Law § 7-3.1(b)(2) (McKinney 1990 Supp.); N.Y. Civ. Prac. Law § 5205(c)(3) (McKinney 1990 Supp.); *In re Kleist*, 114 B.R. 366 (Bankr. N.D. N.Y. 1990). After analyzing New York law, the Seventh Circuit concluded, "There can be no doubt: New York law puts Morter's pension benefits well beyond the reach of Farm Credit Services or any other creditor." Pet. App. 40.

The Seventh Circuit continued by noting that in *every* decision it could find addressed to the pointed question of whether a TIAA plan was excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2), "the answer was a resounding 'yes.'" Pet. App. 38 (citing *In re Reynolds*, No. 87-15311F, slip op. (Bankr. W.D. Ark., September 18, 1989) (Respondent's Appendix A); *In re Montgomery*, 104 B.R. 112 (Bankr. N.D. Iowa 1989); *In re Woodward*, No. 3-86-3344(3), A.P. No. 3-87-0036, slip op. (Bankr. W.D. Ky., February 16, 1988) (Respondent's Appendix B), *aff'd*, No. 3-86-3344(3)7 Civil Action C88-0161-L(A), slip op. (W.D. Ky., June 24, 1988) (Respondent's Appendix C); *In re Braden*, 69 B.R. 93 (Bankr. E.D. Mich. 1987)). *See also*, *Connick v. Teachers Insurance and Annuity Association of America*, 784 F.2d 1018 (9th Cir.)(professor could not reach assets in TIAA-CREF plan until retirement, and then only as set forth in plan), *cert. denied*, 479 U.S. 822 (1986).

Moreover, petitioner did not cross-appeal the exclusion of Purdue University's CREF component of the retirement plan. The above-cited bankruptcy decisions excluded both TIAA and CREF, treating the two components similarly. The district court here treated TIAA differently from CREF. Respondent appealed the ruling regarding TIAA, but petitioner did not cross-appeal the exclusion of CREF from the bankruptcy estate. The Seventh Circuit had appellate jurisdiction over only the TIAA portion of the retirement plan. Rather than seeking to bring

consistency to the treatment of TIAA-CREF plans, petitioner's writ threatens the existing consistency regarding the treatment of TIAA-CREF plans.

III.
THE SEVENTH CIRCUIT'S OPINION IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE.

Petitioner argues that an examination of the legislative history behind 11 U.S.C. § 541(c)(2) leads to the conclusion that Congress intended to limit the statute to "traditional" spendthrift trusts. It relies on dicta in a few decisions. *Graham*, 726 F.2d at 1271 ("The legislative history of § 541(c)(2) . . . establishes that Congress intended by that section to preserve the status [of] traditional spendthrift trusts"); *Goff*, 706 F.2d at 582 ("from the legislative history of Section 541(c)(2), it is clear that Congress intended . . . to exempt from the estate only those 'spendthrift trusts' traditionally beyond the reach of creditors under state law"). The dicta in these cases limiting 11 U.S.C. § 541(c)(2) to "traditional" spendthrift trusts is inconsistent with this Court's decisions regarding statutory construction.

The "traditional" spendthrift trust requirement is not found in the language of the statute:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C. § 541(c)(2). Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 110 S.Ct. 2126, 2130 (1990). "In this case it is also where the inquiry should end, for where, as here, the statute's language is plain 'the sole function of the

courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)(citation omitted).

Courts need not resort to legislative history when a statute is clear. "Legislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 808 n.3 (1989). When a statute is clear, interpretations based on legislative history circumvent the democratic process. "[I]t must be assumed that what the Members of the House and Senators thought they were voting for, and what the President thought he was approving when he signed the bill was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said." *United States v. Taylor*, 487 U.S. 326, 345 (1988)(Scalia, J., concurring in part). "Committee reports, floor speeches, and even colloquies between congressmen are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." *Thompson v. Thompson*, 484 U.S. 174, 191-192 (1988)(Scalia, J., concurring in judgment).

The Seventh Circuit in this case held that "the plain language of section 541(c)(2) does not require that a retirement plan be a 'traditional' spendthrift trust." Pet. App. 37. The court of appeals stated that it agreed with the reasoning of the Fourth Circuit that 11 U.S.C. § 541(c)(2)

> should [not] be confined in its recognition of enforceable transfer restrictions to those found in "traditional" spendthrift trusts. The language of § 541(c)(2) does not suggest such a limitation, and the legislative history reveals only that the provision has the unambiguous purpose of preserving enforceable transfer restrictions in spendthrift trusts. . . .

Pet. App. 37 (quoting *McLean v. Central States, Southeast and Southwest Areas Pension Fund*, 762 F.2d 1204, 1207 n.1 (4th Cir. 1985)). The statute is not limited to "traditional" spendthrift trusts. The Seventh Circuit properly applied the plain language of 11 U.S.C. § 541(c)(2) to exclude the TIAA plan from the bankruptcy estate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 24, 1991

91-884

Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

October Term, 1991

FARM CREDIT SERVICES

Petitioner,

vs.

RAYMOND LIONE MORTER D/B/A SWINENGINEERING, INC.

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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27-2-5-1 Spendthrift laws; exemption from judicial process

Sec. 1. No person entitled to receive benefits under a life insurance or life annuity contract, or under a written agreement supplemental thereto, issued by domestic life insurance company, shall be permitted to commute, anticipate, encumber, alienate, or assign such benefits, if the right to do so is expressly prohibited or withheld by a provision contained in such contract or supplemental agreement. And, if such contract, policy or supplemental agreement so provides, such benefits, except when payable to the person who provided the consideration for such contract, shall not be subject to such persons' debts, contracts, or engagements, nor to any judicial process to levy upon or attach the same for payment thereof.

Historical Note

Formerly:

Acts 1931, c. 20, s. 1.

Cross References

Children and minors, competence to execute assignments, see section 27-2-11.1-2. Fraternal benefit societies.

Dependent benefits, exemption from claims of creditors, see section 27-7-7-1.

Exemption of benefits from legal process, see section 27-1-14-16.

Mutual life and accident insurance,

Assignment of policy to person with no insurable interest, see section 27-8-3-8.

Exemption of benefits from legal process, see section 27-8-3-23.

Power to hold proceeds under trust or other agreement, see section 27-1-12-21.

Library References

Spendthrifts 1. I.L.E. Trusts §103.
C.J.S. Spendthrifts §§2, 3.

34-2-28-1 List of exemptions; limitations

Sec. 1. (a) The following property of a judgment debtor domiciled in Indiana is not subject to levy or sale on execution or any other final process from a court, for a judgment founded upon an express or implied contract or a tort claim:

(1) Real estate or personal property constituting the personal or family residence of the judgment debtor or a dependent of the judgment debtor, or estates or rights in that real estate or personal property, of not more than seven thousand five hundred dollars ($7,500). The exemption under this subsection is individually available to joint judgment debtors concerning property held by them as tenants by the entireties.

(2) Other real estate or tangible personal property of four thousand dollars ($4,000).

(3) Intangible personal property, including choses in action (but excluding debts owing and income owing), of one hundred dollars ($100).

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT GARY/LAFAYETTE

IN RE:	)	
	)	
RAYMOND LIONE MORTER	)	BANKRUPTCY NO.
aka/dba:	)	86-40369
Swinengineering, Inc.	)	
	)	
Debtor	)	

MEMORAMDUM OPINION AND ORDER[1]

I
Statement of Proceedings

This Chapter 7 case came before the Court on the objections filed by Farm Credit Services of Madison, Wisconsin d/b/a Production Credit Association and d/b/a The Federal Bank Association (hereinafter: "FCS") on August 8, 1986, and by the Chapter 7 trustee on August 5, 1986 to the Debtor's Schedule B-4 of property claimed exempt.

On February 7, 1989, the parties filed their stipulation of facts.

By Order of Judge Grant on February 23, 1989, he recused himself as to this contested matter, and by Order of March 6, 1989, Judge Lindquist assumed jurisdiction of the same.

The Order of February 23, 1989 further provided that the issues raised by the objections were to be submitted on the parties pretrial statements, stipulation of facts and briefs.

---

[1]This Order constitutes the Court's Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52 as made applicable by Bankruptcy Rule 9014 and 7052.

II
Conclusions of Law and Discussion

No objection was made by counsel to the jurisdiction of this Court as to this matter, the Court finds jurisdiction to be present, and that this contested matter is a core proceeding pursuant to 28 U.S.C. §157.

Pursuant to 11 U.S.C. §522(b) and I.C. 34-2-28-0.5 Indiana has "opted-out" of the federal exemption scheme, thus the Indiana Exemption Statutes are applicable to the Debtor's property claimed exempt in this case.

Indiana Code 34-2-28-0.5 provides as follows:

> Sec. 0.5. In accordance with section 522(b) of the Bankruptcy Code of 1978 (11 U.S.C. 522(b)), in any bankruptcy proceeding, an individual debtor domiciled in Indiana:
>
> (1) is not entitled to the federal exemptions as provided by section 522 (d) of the Bankruptcy Code of 1978 (11 U.S.C. 522(d)); and
>
> (2) may exempt from the property of the estate only that property specified by Indiana law.

Indiana Code 34-2-28-1 provides as follows:

> (a) The following property of a judgment debtor domiciled in Indiana is not subject to levy or sale on execution or any other final process from a court, for a judgment founded upon an express or implied contract or a tort claim:
>
> (1) Real estate or personal property constituting the personal or family residence of the judgment debtor or a dependent of the judgment debtor, or estates or rights in that real estate or personal property, of not more than seven thousand five hundred dollars ($7,500). The exemption under this subsection is individually available to joint judgment debtors concerning property held by them as tenants by the entireties.

(2) Other real estate or tangible personal property of four thousand dollars ($4,000).

(3) Intangible personal property, including choses in action (but excluding debts owing and income owing), of one hundred dollars ($100).

(4) Professionally prescribed health aids for the judgment debtor or a dependent of the judgment debtor.

(5) Any interest the judgment debtor has in real estate held as a tenant by the entireties on the date of the filing of the petition for relief under the bankruptcy code, unless a joint petition for relief is filed by the judgment debtor and spouse, or individual petitions of the judgment debtor and spouse are subsequently consolidated.

(b) This section does not apply to judgments obtained before October 1, 1977.

(c) The total value of exempted property under subdivisions (1), (2), and (3) may not exceed ten thousand dollars ($10,000).

The Debtor's Schedule B-4 claims as exempt, among other things, the following property:

Type of Property	Location, Present use, etc. of property	Specify statute creating the Exemption	Value Claimed Exempt
Annuity	College Retirement & Equity Fund & Teachers Insurance & Annuity	I.C. 27-2-5-1 I.C. 34-2-28-1	$280,795.86
Life Insurance Policy	New York Life Insurance Policy No. NP 118 877	I.C. 27-2-5-1 I.C. 34-2-28-1	4,000.00

The objection of FCS asserts that the Debtor's claimed exemptions are in excess of the exemption limits provided by Indiana law, that the exemptions claimed under I.C. 27-2-5-1

are not applicable to the intangible property the Debtor identifies as exempt, and are otherwise improper.

The objection of the trustee generally asserts that the exemption claimed by the Debtor in his College Retirement Equities Fund and Teachers Insurance and Annuity Contract in the sum of $280,795.86 is not an exempt asset.

On October 10, 1986, the Debtor, pursuant to Court Order of September 12, 1986 filed true and complete copies of the relevant "Fund" document and the "Annuity" document in which the Debtor claims an exemption.

The stipulation filed by the parties on February 7, 1989 recites the following:

> 1. That the Debtor's employer, Purdue University (hereinafter: "Purdue") pays the entire cost of participation in the employees-Debtor's Teacher's Insurance and Annuity Association of America (hereinafter: "TIAA") Periodic Premium Retirement Annuity Contract, and College Retirement Equity Fund (hereinafter: "ICREF") contract. *See* p.7 of Retirement Plan Booklet (hereinafter: "Booklet").
>
> 2. That the Debtor as a participant may make voluntary extra payments to the Retirement Funds (Booklet, p. 10), but the Debtor has not made any extra voluntary payments.
>
> 3. That the applicable anti-alienation language appears at paragraphs 16 and 17 of the TIAA contract and at paragraphs 16 and 17 of the CREF contract.
>
> 4. That it "would appear" that if the Debtor-participant terminates employment prior to retirement, the benefits in the plans remain vested and are payable at retirement age or participation can continue if employment is resumed at an educational institution involved in the TIAA and CREF plans (*See*, Booklet, p. 11).
>
> 5. The Booklet provides that the plans do not provide for loans or have cash surrender value (*See*, Booklet, p. 11).
>
> 6. That the Debtor was born on September 7, 1920; that

from August 1, 1959 through June 30, 1960, the Debtor began participation in the TIAA and CREF plans while an employee at Iowa State University; that effective July 1, 1960, the Debtor began his employment at Purdue; and, that to the "best of Raymond L. Morter's knowledge" the provisions set out above with regard to the TIAA and CREF contracts were in effect at the time he began participation thereunder.

7. That the mandatory retirement age is 70; that annuity income begins not later than April 1 of the calendar year following the year in which the annuitant attains the age of 70 1/2 years; and, that under "current law and TIAA practice" an annuitant may postpone the start of annuity income for a year at a time provided he continues to be employed by an institution with a TIAA and CREF retirement or tax deferred annuity plan.

8. That the Debtor is presently employed at Purdue and is not eligible to obtain annuity payments for the TIAA and CREF plans.

The GENERAL PROVISIONS of the TIAA specimen contract at paragraphs 16 and 17 as submitted to the Court on October 10, 1986 by Debtor's counsel provide as follows:

16. No Assignment. Any assignment or pledge of this contract or of any benefit hereunder shall be void and of no effect.

17. Protection Against Claims of Creditors. The benefits, options, rights and privileges accruing to any Beneficiary will not be transferable or subject to surrender, commutation, or anticipation, except as may be otherwise endorsed on this contract. To the extent permitted by law, annuity and other benefit payments will not be subject to the claims of any creditor of any beneficiary or to execution or to legal process.

The GENERAL PROVISION section of the CREF specimen contract filed with the Court on October 10, 1986 by Debtor's attorney at paragraphs 16 and 17 provide as follows:

16. No Assignment. Any assignment or pledge of this certificate or of any benefit hereunder will be void and of no effect.

17. Protection Against claims of Creditors. Benefits under this certificate are protected by the following clause contained in the statute of the State of New York establishing CREF:

> No money or other benefit provided or rendered by the corporation hereby formed, nor any rights or interests of any participating person in any benefit provided by said corporation, or of any beneficiary of any such person, or any others who may have a right derived from any such person or beneficiary, shall be subject to assignment or pledge, or be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of any such person, or of any beneficiary of any such person, or of any others who may have a right under any such person or beneficiary.

The Supreme Court has stated the following regarding the debtor's property and whether it is included in the debtor's bankruptcy estate:

> Property rights are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a state serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy.

Butner v. United States, 440 U.S. 48, 55, 99 S. Ct. 914, 918, 49 L. Ed.2d 136 (1979). (Citation omitted).

Generally, the designation under §541 is broad enough to include "all interests of the debtor, both legal and equitable, . . ." *United States v. Whiting Pools, Inc.*, 462 U.S. 198,

204-205 & nn. 8, 9, 103 S. Ct. 2309, 2313 & nn. 8, 9, & 10 76 L. Ed.2d 515 (1983). The Supreme Court at n. 8 stated, "The legislative history indicates that Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title", and n. 10, where the Court stated, "We do not now decide the outer boundaries of the bankruptcy estate. We note only that Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition."

The Seventh Circuit Court of Appeals in the recent case of *Koch Refinery v. Farmers Union Cent. Exchange*, 831 F.2d 1339 (7th Cir. 1987), stated as follows:

> *Section 541* of the Bankruptcy Code, which creates the bankruptcy estate, *offers an expansive definition of property* comprising the estate: Whatever "legal and equitable interests" the debtor had in property as of the filing of the bankruptcy petition is property of the bankruptcy estate. *The debtor's interest in property is determined by non-bankruptcy law, but the determination of what constitutes section 541 property is a federal question.* H.R. Rep. No. 595, 95th Cong., 1st Sess. 367-68 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82-83 (1978), U.S. Code Cong. & Admin. News 1978, p. 5787. Once the bankruptcy petition has been filed, property rights belonging to a debtor under state law become assets of the estate. *Butner v. United States*, 440 U.S. 48, 54, 99 S. Ct. 914, 917, 59 L. Ed.2d 136 (1979); *Matter of Kaiser*, 791 F.2d 73, 74 (7th Cir. 1986), *cert. denied*, — U.S. — , 107 S. Ct. 655, 93 L. Ed.2d 710 (1986).

Id. at 1343. (Emphasis added).

Thus, state law, here that of the State of Indiana, controls as to what property rights are created in the TIAA and CREF contracts as the Bankruptcy Code does not speak directly to the issue, while the Bankruptcy Code determines if those property rights are included in the Debtor's estate.

11 U.S.C. §541(a)(1) sets out what is property of the Debtor's

bankruptcy estate. (§542(a)(2) relates only to community property which is not applicable here). That section provides as follows:

> (a) The commencement of a case section 301, 302 or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) *Except as provided in subsections (b) and (c)(2)* of this section, *all legal or equitable* interests of the debtor in property as of the commencement of the case. (Emphasis added).

11 U.S.C. §541(c) provides as follows:

> (c)(1) *Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2),* or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—
>
> (A) *that restricts or conditions transfer of such interest by the debtor;* or
>
> (B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.
>
> (2) *A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.* (Emphasis supplied).

Indiana Code 27-1-5-1 relating to Annuity Contracts provides as follows:

> Sec. 1. *No person entitled to receive benefits under* a life insurance or life *annuity contract*, or under a written agreement supplemental thereto, *issued by domestic life*

> *insurance company, shall be permitted to commute, anticipate, encumber, alienate, or assign such benefits, if the right to do so is expressly prohibited or withheld by a provision contained in such contract or supplemental agreement.* And, if such contract, policy or supplemental agreement so provides, such benefits, except when payable to the person who provided the consideration for such contract, shall not be subject to such persons' debts, contracts, or engagements, nor to any judicial process to levy upon or attach the same for payment thereof. (Emphasis added).

It is noted that although the Debtor sets out the annuity contracts as exempt under I.C. 27-2-5-1 in Schedule B-4, this provision is not truly an exemption statute, it is a statute which validates an anti-assignment or spendthrift provision in a life insurance or life annuity contract.

Indiana Code 30-4-3-2 as part of the Indiana Trust Code provides as follows:

> Sec. 2. (a) The settlor may provide in the terms of the trust that the interest of a beneficiary may not be either voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee.
>
> (b) Except as otherwise provided in subsection (c), if the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of his beneficial interest will not prevent his creditors from satisfying claims from his interest in the trust estate.
>
> (c) Subsection (a) applies to a trust that meets both of the following requirements, regardless of whether or not the settlor is also a beneficiary of the trust:
>
> (1) The trust is a qualified trust under 26 U.S.C. 401(a).
>
> (2) The limitations on each beneficiary's control over the beneficiary's interest in the trust complies with 29 U.S.C. 1056(d).

(d) A trust containing terms authorized under subsection (a) may be referred to wherever appropriate as a trust with protective provisions.[2]

Indiana Code 30-4-1-1 defines a "Trust", the relationships excluded from the Indiana Trust Code, and discusses the transferability of an employee benefit trust. That section provides as follows:

Sec. 1 (a) A trust is a fiduciary relationship between a person who, as trustee, holds title to property and another person for whom, as beneficiary, the title is held.

(b) Subject to IC 30-4-2-8, the same person may be both the trustee and a beneficiary.

(c) The rules of law contained in this article do not apply to:

(1) trusts created by operation of law;

(2) business trusts (as defined in IC 23-5-1);

(3) security instruments and creditor arrangements;

(4) voting trusts;

(5) religious, educational, and cultural institutions, except with respect to IC 30-4-5, as it relates to the maintenance of federal income tax exemption privileges;

(6) nonprofit charitable foundations, corporations, and other associations, except with respect to IC 30-4-5 as it relates to the maintenance of federal income tax exemption privileges;

(7) prepaid funeral plans;

(8) trusts for the care and upkeep of cemeteries;

[2]I.C. 30-4-3-2 was amended by P.L. 287-1987, SEC. 2, Emerg. Eff. April 30, 1987, which deleted a legislatively supplied section heading; inserted the introductory exception clause in subsection (b); and, inserted the present subsection (c).

(9) agreements to furnish funeral services; and

(10) trusts created or authorized by statute other than this article.

(d) IC 30-4-3-2(a) applies to an employee benefit trust that meets the requirements set forth in IC 30-4-3-2(c). However, no other provision of this article applies to an employee benefit trust.[3]

The initial issue is whether clauses 16 and 17 of the TIAA and clauses 16 and 17 of the CREF which are clearly spendthrift clauses pursuant to I.C. 27-2-5-1 operate to exclude the annuity contracts from the Debtor's bankruptcy estate pursuant to §541(a)(1) and (c)(2). It is noted that I.C. 27-2-5-1 is not an exemption statute, but a spendthrift statute.

An annuity is a right to payment of a specified sum of money at stated intervals. I.L.E. *Annuities* §1. Generally speaking, life insurance is a provision for death while an annuity is a provision for life. It is essentially a form of investment. Annuity agreements create only the relation of debtor and creditor, not a trust. *Chatam County Hospital Authority v. John Hancock Mutual Life Ins. Co.*, 325 F. Supp. 614 (S.D. Ga. 1971) , *citing*, *Hughes v. Sun Life Assurance Co. of Canada*, 159 F.2d 110 (7th Cir.). It is a mere chose in action for the payment of money. *See* 4 Am. Jur.2d *Annuities*, §4 and n. 17 and cases cited therein.

Although the manner in which the annuity was created was different in the case of *Matter of Brown*, 86 B.R. 944 (N.D. Ind. 1988), the legal principles applicable there are fully applicable to the case at bar. In *Brown*, the debtors prior to filing bankruptcy had won an Arizona lottery and after an initial distribution of $39,500.00 was to receive the balance by annuity payable by John Hancock Mutual Life Insurance Company at $1,000.00

[3]I.C. 30-4-1-1 was amended by P.L. 287-1987, SEC. 1, Emerg. Eff., April 30, 1987, which deleted a legislatively supplied section heading; rewrote subsection (c); and, added subsection (d).

a week for 948 weeks. The annuity contract contained an exhaustive anti-alienation clause. The *Brown* court held as follows:

> Eleven U.S.C. §541 is a broadly inclusive statute defining property of a bankruptcy estate. The scope of §541(a) is particularly "broad and all embracing." *In re Miller*, 16 B.R. 790, 791 (Bkrtcy. D. Md. 1982). But for a specific, narrowly construed exception set forth in §541(c)(2), an interest of a debtor will become property of the bankruptcy estate despite any agreement to the contrary which attempts to restrict transfer. 11 U.S.C. §541(c)(1)(A).
>
> Under subsection (2), however, "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. §541(c)(2). The law is clear that this provision was intended by Congress to specifically preserve "restrictions on transfer of a spendthrift trust." *In re Miller* at 791, quoting H. Rep. No. 95-595, 95th Cong., 1st Sess. 369 (1977); S. Rep. No. 95-989, 95th Cong., 2nd Sess. 83 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5869, 6325. *See also* Ind. Code 30-4-3-2; *Matter of Cook*, 43 B.R. 996 (N.D. Ind. 1984).
>
> As a general rule, a beneficiary's interest in a spendthrift trust is excluded from his bankruptcy estate if state law and the trust so provide. Bankr. Code, 11 U.S.C.A. §541(c)(2); *Matter of Moody*, 837 F.2d 719 (5th Cir. 1988); *Matter of Goff*, 706 F.2d 574, 580 (5th Cir. 1983). The Indiana Code and Indiana cases recognize and clearly define a spendthrift trust and its requirements.
>
> Pursuant to Ind. Code 30-4-3-2, a settlor may provide in the terms of a trust that the beneficiary's interest may neither voluntarily nor involuntarily be transferred before payment or delivery of the interest to the beneficiary. If the settlor is also a beneficiary of the trust, such a provision will not prevent creditors from satisfying claims from the beneficiary's interest in the trust estate. Ind.

Code 30-4-3-2(a)-(b). To qualify as a spendthrift trust, it must be shown that the settlor is not a beneficiary of the plan, that the plan contains an anti-alienation clause, and that debtor beneficiary has no present dominion or control over the plan corpus. *Matter of McVade*, 72 B.R. 560, 562 (Bkrtcy. N.D. Ind. 1987); *Matter of Cook*, 43 B.R. 996, 1001 (N.D. Ind. 1984); *Matter of Jones*, 43 B.R. 1002, 1006 (N.D. Ind. 1984).

Cook, *Jones* and *McVade* all involve the issue of whether an ERISA-qualified retirement plan meets the requirements of a spendthrift trust. It is evident from these and other similar cases, that retirement plans will be examined by the courts on a case by case basis. Some will be seen as spendthrift trusts and others will not, with the key element being that of the beneficiary's access to the funds. A recent amendment to §30-4-3-2 provides some support for the position that a retirement plan meeting specific requirements might in some limited circumstances qualify as a spendthrift trust. *See*, Ind. Code 30-4-3-2(c). Again, the key factor appears to be the accessibility of the funds.

* * * *

The annuity agreement in this case is a contract between an Indiana resident and the Arizona Lottery Commission. Its purpose is to specify a method of payment for Arizona lottery winnings. In a sense, the agreement is the remaining portion of the prize itself. As such, its enforcement might well be shunned by Indiana courts, unlike the agreement in *Kaszuba*. Enforcement is, however, not the issue here. In fact, there is no element of contingency involved with respect to the debtors' receipt of at least $4,000.00 per month of unearned monies. (For a discussion of contingency, *see In the Matter of Xonics Photochemical, Inc.*, 841 F.2d 198 (7th Cir. 1988)). The debtors' weekly payments are here assured by a contractual agreement that is presumed to be legally enforceable, at least in Arizona. For purposes of the underlying bankruptcy, as correctly determined by the bankruptcy court, the agreement represents a contractual interest of the

debtor, rightfully considered part of the bankruptcy estate.

* * * *

The weekly annuity payments should be, and are as a matter of law and policy, included in the bankruptcy estate. See, In re Koonce, 54 B.R. 643 (Bkrtcy. D.S.C. 1985) and *In re Miller*, 16 B.R. 790 (Bkrtcy. D. Md. 1982), both finding lottery winnings not to qualify as excludable from the bankruptcy estate.

As a final matter, the debtors' assertion that the annuity contract is excludable by way of Ind. Code 27-2-5-1, which provides that benefits from a life annuity contract will be inalienable if so specified in an annuity contract, is without merit. A spendthrift provision enforceable in bankruptcy court must be contained in a trust. The agreement here is a contract. An approach similar to that of the debtors was specifically rejected in *In re Power*, 115 F.2d 69 (7th Cir, 1940). *See also*, *Miller* at 791. The court's comments in *Miller* apply and bear repeating here:

It is beyond question that the Debtor's interest, albeit in some respects a future interest, in the lottery winnings became property of the estate upon the filing of his petition for relief under Chapter 7 of the Bankruptcy Code. The scope of §541(a) is broad and all embracing. *In re Ford*, 3 B.R. 559, 568-70 (Bkrtcy., D. Md. 1980), *aff'd per curiam sub nom Greenblatt v. Ford*, , 638 F.2d 14 (4th Cir. 1981). *Cf. In re Ryan*, 15 B.R. 514 Bankr. L. Rep. (CCH) para. 68,466 (Bkrtcy., D. Md. 1981). The Court is unconvinced that lottery winnings payable pursuant to an annuity contract are subject to a "restriction on the transfer of a beneficial interest of the debtor in a trust" within the meaning of the §541(c)(2) limitation of the scope of §541(a). Congress intended §541(c)(2) to preserve "restrictions on transfer of a spendthrift trust." H. R. Rep. No. 95-595, 95th Cong., 1st Sess. 369 (1977); S. Rep. No. 95-989, 95th Cong., 2nd Sess. 83 (1978), U.S. Code Cong. & Admin. News 1978, p. 5787. Thus, the Debtor's interest in the lottery winnings are property of the estate subject to any valid exemption.

Id. at 946-948.

The fact that the annuity contract was funded by contributions by the Debtor's employer rather than by lottery winnings does not change the legal nature of the instruments they are still contracts and not trusts, and thus do not fall within the scope of I.C. 30-4-3-1 and 2, and in turn §541(c)(2). Indiana Code 27-2-5-1 and the anti-alienation clauses in the annuity contracts protects the debtor outside of bankruptcy, but does not prevent the inclusion of the same contracts from being included in the debtor's estate pursuant to §541(a)(1).

In the case of *In re Power*, 115 F.2d 69 (7th Cir. 1940), the Debtor claimed as an exempt asset of his bankruptcy estate an annuity contract purchased by him in 1928 from Aetna Life Insurance Company. The Annuity contract provided as follows:

> 1. That the annuity contract was issued in consideration for a single payment of $19,954.00.
>
> 2. Aetna was to pay $100.00 for 204 months and if the Debtor or his wife should be alive on April 28, 1942, Aetna was obligated to continue monthly payments during the lifetime of both or either and then terminate.
>
> 3. That neither the Debtor nor the wife nor any beneficiary under the contract had the right to transfer, assign, or to anticipate his or her right to the annuity payments hereunder.

The Court held that the annuity contract was not exempt property under the provisions of §2-3501 of Burn's Indiana Statutes of 1933 as amended by Acts of 1937 C. 296, 1. That exemption statute granted the following exemptions:

> (a) Real estate, or estates or rights therein or thereto of the value of not more than seven hundred dollars [$700].
>
> (b) Tangible personal property to the value of six hundred dollars [$600].
>
> (c) Intangible personal property, including choses in action, profits, debts owing, and income owing, to the value of fifteen dollars ($15.00).

> (d) Income or profits of whatever nature of not more then fifteen collars [$15.00] per week. If such income and profits shall exceed the sum of fifteen dollars [$15.00] per week, then ninety [90] percentum of such income and profits in excess of said sum of fifteen dollars [$15.00] per week shall be exempt and ten [10] percentum thereof shall be subject to execution, provided, however, that none of the foregoing provisions of this act shall apply to any judgment obtained prior to July 1, 1937.

This is the predecessor to the present I.C. 34-1-28-1 which is applicable to the case at bar.

The Court concluded that the payment of $100.00 a month was not income or profit within the meaning of paragraph (d) of the exemption statute as then constituted, but was the payment under a contract where for a gross sum paid the company it became liable to pay certain sums annually during the life of the annuitant. The Court further concluded that since the right to receive the payment was purchased, and paid for prior to the adjudication in bankruptcy, the payments were essentially repayments in installments of the sum with which the annuity was purchased, *citing*, *Legg v. St. John*, 296 U.S. 489, 297 U.S. 695, 56 S. Ct. 336, 80 L. Ed.2d 345 (1936), and *Moskowitz v. Parrs*, 68 F.2d 618 (6th Cir.).

Finally, the *Power* court concluded that the exemption would be limited to any payments due when the petition was filed and the language of the contract cannot be construed to exempt payments due after the filing of the bankruptcy petition and continuing during the life of the annuitant.

Accordingly, the Court concludes that §541(c)(2) does not apply in this case and the annuity contracts are property of the Debtor's estate.

The only issue remaining is the fact that the Debtor has no right to payment under the annuity contracts until he retires and even upon reaching retirement age he may postpone the start of annuity payments by continuing employment at an institution that has a TIAA or CREF retirement or tax deferred annuity plan.

We believe that *In re Ryerson*, 739 F.2d 1423 (9th Cir. 1984) correctly analyzed such a situation. There the debtor became entitled to certain money under a prepetition appointment agreement. In the event of cancellation or other termination of the appointment, the Company could at their option pay to the debtor the contract value of the agreement. The debtor terminated employment approximately eight months after he filed his petition and the contract value was due at that time. The Debtor argued that the sum was not included in his estate as the contract had not been terminated or cancelled on the date of his petition, and thus had no "contract value" as it was a nontransferable, contingent interest. The *Ryerson* Court stated as follows:

> Under the Act, a contingent interest in personal property passed to the trustee only if it was capable of being assigned or was subject to execution, seizure, or sequestration. 4 A. *Collier on Bankruptcy* para. 70.37 at 453 (14th ed. 1978). However, the requirement that the debtor must be able to transfer the interest or that his creditors by some means must be able to reach it has been eliminated under the Code. 4 *id.* para. 541.08[1] (15th ed. 1984). By including all legal interest without exception, congress indicated its intention to include all legally recognizable interests although they may be contingent and not subject to possession until some future time. H.R. Rep. No. 595, 95th Cong., 1st Sess. 175-76 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6136. We therefore conclude that Ryerson's interest in the "contract value," albeit contingent at the time of filing and not payable until such time as his appointment is terminated or cancelled, is includable within the bankruptcy estate pursuant to section 541(a)(1).
>
> Having concluded that Ryerson's right to "contract value" is property of the bankruptcy estate, we have no difficulty concluding that any payments paid upon termination of Ryerson's appointment are also property of the bankruptcy estate although paid after commencement of the case, at least to the extent the payments are related to prebankruptcy services. Section §541(a)(6) of the Code includes in the bankruptcy estate after-acquired property

> consisting of "[p]roceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case." 11 U.S.C. §541(a)(6). It follows therefore that earnings from services performed prior to bankruptcy are includable within the bankruptcy estate. Under the Act, the test was whether the after-acquired property was "sufficiently rooted in the prebankruptcy past and so little entangled in the debtor's ability to make a fresh start that it should not be excluded from property of the estate." *Segal v. Rochelle*, 382 U.S. 375, 380, 86 S. Ct. 511, 515, 15 L. Ed.2d 428 (1966). The Code follows *Segal* insofar as it includes after-acquired property "sufficiently rooted in the prebankruptcy past" but eliminates the requirement that it not be entangled with the debtor's ability to make a fresh start. *See* S. Rep. No. 989, *supra* at 82, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5868. We think that the termination payments representing value for years of service completed prior to bankruptcy, and not being an arbitrary amount arising after bankruptcy, are "sufficiently rooted in the pre-bankruptcy past" as to be included within the bankruptcy estate. *See In re Durham*, 272 F.Supp. 205, 209 (S.D. Ill. 1967).

Id. at 1425-1426.

Thus, the contract value of these annuity contracts become part of the Debtor's estate to the extent of prepetition contributions made thereunder as of the date of the Debtor's petition, though contingent and not payable at this time. *Cf. In re Hammond*, 9 C.B.C.2d 830 (Bankr. W.D. Okla. 1983), where the Court held that where a debtor enters into a contract prior to the filing of a chapter 11, and will receive annual payments as consideration for a noncompetitive clause, such future annual installment payments are not property of the estate since the debtor has not done all the acts necessary to accrue his right to future payments, and the debtor would not perform a service sufficiently rooted in his prebankruptcy past, so as to render the payments property of the estate. In the case at bar, the

prepetition contribution made by the Debtor's employer pursuant to the annuity contracts were solely in consideration for the rendering of prepetition services to the Debtor's employer, and clearly are rooted in his prebankruptcy past.

As noted by the Court in *Anderson v. St. Paul Indemnity Co.*, 340 F.2d 406 (7th Cir. 1965) (an act case), any asset or chose in action of the bankrupt that could have been enforced by the bankrupt had he not gone into bankruptcy automatically vests in and becomes property of the trustee. (upholding right of trustee to sue the Debtor's insurance company for negligence, bad faith, and willfulness and gross negligence in failing to settle an insurance claim.)

The only exemption that is allowable on these annuity contracts is that of $100.00 as an intangible personal property right pursuant to I.C. 34-2-28-1(a)(3). *See e.g. Matter of Jones*, 768 F.2d 923 (7th Cir. 1985).

It is therefore,

ORDERED, ADJUDGED AND DECREED that the objections to claimed exemptions of the Debtor are hereby sustained, and that said annuity contracts are property of the Debtor's estate pursuant to 11 U.S.C. §541(a)(1).

DATED:

(EOD 07-10-89)

JUDGE, U.S. BANKRUPTCY COURT

Distribution

Debtor, Raymond Morter, PO box 2292, W. Lafayette, IN 47906

Atty. for Debtor, Carolyn Holder, 700 Bank One Bldg., PO Box 757, Lafayette, IN 47902

Chet Zawalich, 725 Trustcorp Bldg., South Bend, IN 46601

U.S. Trustee

Edward Chosnek, PO box 708, Lafayette, IN 47902

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

JUDGMENT IN A CIVIL CASE
CASE NUMBER: L89-62

RAYMOND LIONE MORTER
d/b/a SWINENGINEERING, INC.

v.

FARM CREDIT SERVICES

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this court having found the CREF component of Morter's retirement plan excluded from the bankruptcy estate pursuant to §541(c)(2), the judgment of the Bankruptcy Court is hereby VACATED in part and AFFIRMED in part. The case is REMANDED for a determination of the value of the TIAA plan. In addition, Morter asks this court to find the TIAA plan exempt from the bankruptcy estate pursuant to Indiana or other applicable state law. On this issue, the Bankruptcy Court correctly applied Indiana law and properly determined the only allowable exemption on the annuity contract is the $00 intangible personal property exemption pursuant to I.C. 34-2-28-1(a)(3).

February 8, 1990
Date

Richard R. Timmons
Clerk

Connie Sue Inman
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
LAFAYETTE DIVISION

RAYMOND LIONE MORTER d/b/a SWINENGINEERING, INC.,	)	
Plaintiff	)	
v.	)	Civil No. L89-62
FARM CREDIT SERVICES,	)	
Defendant	)	

MEMORANDUM OPINION AND ORDER

Raymond Lione Morter is a professor of veterinary science at Purdue University. Morter has served the university as a faculty member for thirty of his 69 years. He faces mandatory retirement when he turns 70 this fall. Though approaching his "golden years" both professionally and chronologically, Morter recently filed a petition for relief under Chapter 7 of the United States Bankruptcy Code. Chapter 7 liquidation is a remedy through which the debtor, in effect, surrenders his non-exempt assets pro rata to his creditors and seeks the relief of a discharge.

An educator at the college level for most of his adult life, Morter holds an interest in two retirement annuities identified as the Teacher's Insurance and Annuity Association (TIAA) and the College Retirement Equity Fund (CREF). Purdue University, as Morter's employer, has paid the entire cost of his participation in the TIAA-CREF plans. A plan participant may voluntarily make additional payments to his retirement fund, but Morter has not done so. Upon his retirement, Morter will receive a periodic stream of income until he dies. The annuities do not provide for loans or have cash surrender value, and the right to receive income may not be

pledged or assigned.[1] Morter argues the annuities (the combined value of which exceeds $280,000) are exempt property under relevant law and thus not part of the bankruptcy estate reachable by his creditors.

The Bankruptcy Court, applying Indiana law, held the only allowable exemption on the annuity contracts was the $100 intangible personal property right pursuant to I.C. 34-2-28-1(a)(3). Morter appeals that determination and presents two issues for this court's review: 1) whether the TIAA-CREF annuities are excludable from the bankruptcy estate under 11 U.S.C. §541(c)(2) and 2) whether the retirement plan annuities are exempt from the bankruptcy estate pursuant to Indiana or other applicable state law.

28 U.S.C. §158(a) confers jurisdiction in the district court to hear this appeal, taken pursuant to Bankruptcy Rule 8001(a), from the Bankruptcy Court's final judgment.

I. Standard of Review

Rule 8013 of the Federal Rules of Bankruptcy Procedure governs the pertinent standard of review. In an appeal from a bankruptcy court's decision, a district court applies two standards of review: one for findings of fact; the other for conclusions of law. *Matter of Busick*, 65 B.R. 630, 632 (N.D. Ind. 1986). When the appellant alleges errors of fact, Rule 8013 dictates that "findings of fact shall not be set aside (by the district court) unless clearly erroneous." *See also In re Kimzey*, 761 F.2d 421, 423 (7th Cir. 1985). A finding is clearly erroneous when, "although there is

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[1]Paragraph 16 of the TIAA specimen contract provides: "Any assignment or pledge of this contract or any benefit hereunder will be void and of no effect." Paragraph 17 provides:

> The benefits, options, rights, and privileges accruing to any Beneficiary will not be transferable or subject to surrender, commutation, or anticipation, except as may be otherwise endorsed on this contract. To the extent permitted by law, annuity and other benefit payments will not be subject to the claims of any creditor of any Beneficiary or to execution or to legal process.

The CREF specimen contract contains similar provisions.

evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985).

The relevant standard of review for conclusions of law also is governed by Rule 8013, which provides the district court with the discretion to "affirm, modify, or reverse" the bankruptcy court's legal conclusions. *See also Matter of Evanston Motor Co.*, 735 F.2d 1029, 1031 (7th Cir. 1984). When a bankruptcy judge's conclusions are challenged, the district court must make a de novo review and may overturn the findings if they are contrary to law. *Busick*, 65 B.R. at 632.

Having found the Bankruptcy Court's factual findings not clearly erroneous, this court proceeds to review independently the Bankruptcy Court's conclusions of law.

II. Legal Conclusions and Discussion

Raymond Morter filed a Chapter 7 bankruptcy petition in June of 1986 and, in so doing, created a bankruptcy estate. Generally, a bankruptcy estate consists of "all legal and equitable interests of the debtor in property as of the commencement date." 11 U.S.C. §541(a)(1). The only relevant exception for purposes of this review is found at 11 U.S.C. §541(c)(2). This section provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable under this title." 11 U.S.C. §541(c)(2). Thus, if state law prevents a creditor from reaching income payable at a future date (as when the debtor is the beneficiary of a spendthrift trust), then the Bankruptcy Code will similarly treat that right to receive future income as outside the bankruptcy estate and likewise unreachable by creditors.

The legislative history to §541(c)(2) unambiguously indicates this provision was designed to preserve the restrictions on spendthrift trusts. H.R. Rep. No. 595, 95th Cong., 1st Sess. 369 (1977) ("Paragraph (2) of subsection (c) . . . preserves restrictions on

transfer of a spendthrift trust to the extent that the restriction is enforceable under applicable nonbankruptcy law."); S. Rep. No. 989, 95th Cong., 2d Sess. 83 (1978) ("Paragraph (2) of subsection (c) . . . preserves restrictions on a transfer of a spendthrift trust that the restriction is enforceable nonbankruptcy law to the extent of the income reasonably necessary for the support of a debtor and his dependents."). What remains unclear is whether §541(c)(2) excludes from the bankruptcy estate only traditional spendthrift trusts, or whether Congress also intended to exclude other "arrangements"[2] that exhibit the characteristics of a spendthrift trust.

Other circuits addressing this question have generally taken the conservative view that Congress intended to exclude from the bankruptcy estate only traditional spendthrift trusts as they are defined under applicable nonbankruptcy law. *See, e.g., In re Swanson*, 873 F.2d 1121, 1123 (8th Cir. 1989) (" 'Congress only intended by §541(c)(2) to preserve the status of traditional spendthrift trusts, as recognized by state law . . . .' ") *quoting In re Graham*, 726 F.2d 1268, 1271 (8th Cir. 1984); *In re Lichstrahl*, 750 F.2d 1488, 1490 (11th Cir. 1985) ("'[A]pplicable nonbankruptcy law' refers only to state spendthrift law. Therefore, . . . pension plans . . . are excluded pursuant to section 541 (c)(2) only if they are enforceable under state law as spendthrift trusts."); *Matter of Goff*, 706 F.2d 574, 580 (5th Cir. 1983) ("Congress intended to exclude only trust funds in the nature of 'spendthrift trusts' from the property of the estate."). *But see McLean v. Central States, Southwest Areas Pension Fund*, 762 F.2d 1204, 1985) ("Nowhere in the statute [§541(c)(2)] is there a requirement that the trust be 'traditional,' nor is there any definition of what might be found to constitute a 'traditional' trust."). While the statutory language of §541(c)(2) does not expressly limit the exclusion solely to spendthrift trusts, the court finds the legislative history and the cited circuit opinions to be persuasive authority for the narrower con-

[2]Such as ERISA-qualified plans. For a listing of Employee Retirement Income Security Act qualifications, see generally 29 U.S.C. §1056 and 26 U.S.C. §401.

struction urged by the trustee and Farm Credit Services. Accordingly, the court holds that, for the TIAA-CREF plans to be excluded from Morter's bankruptcy estate under §541(c)(2), they must be spendthrift trusts under applicable nonbankruptcy law.

Paragraph 20 of the TIAA specimen contract provides in relevant part: "This contract is made and delivered and is to be performed in the State of New York. It is to be governed as to its validity and effect by the laws there in force, with reference to which it is made." Paragraph 20 of the CREF specimen contract reads almost verbatim in specifying that the laws of the State of New York are to govern the contract's validity and effect. Because Morter and TIAA/CREF expressly have provided that New York law will govern their contracts, the court finds New York's spendthrift trust law to be the "applicable nonbankruptcy law." This holding is consonant with other courts that have addressed the issue. *See, e.g., In re Montgomery*, 104 B.R. 112, 115 (Bankr. N.D. Iowa 1989) ("New York law governs the effect and validity of the TIAA/CREF annuities . . . ."); *In re Braden*, 69 B.R. 93, 94 (Bankr. E.D. Mich. 1987) ("[A]pplicable non-bankruptcy law" . . . is the law of the State of New York . . . ."). Accordingly, if the TIAA/CREF plans qualify under New York law as spendthrift trusts, then the plans are excluded from Morter's bankruptcy estate under §541(c)(2); if the plans are not spendthrift trusts under New York law, then they are considered property of the estate pursuant to §541(a).

The above-cited bankruptcy cases (*Montgomery* and *Braden*) also grappled with New York's treatment of the TIAA/CREF retirement plans. In each case, the court excluded the plans from the bankruptcy estate after finding them enforceable under applicable state law. But only the *Montgomery* court specifically found the pension plans to constitute a valid spendthrift trust under nonbankruptcy law. *Montgomery* 104 B.R. at 116 ("The law of the State of New York fully supports the contention that the annuity plan is a spendthrift trust under 'applicable nonbankruptcy law.'"). The *Braden* court seemed to apply the more liberal standard of not requiring the pension plans to constitute a

traditional spendthrift trust under applicable law.[3] Because this court has adopted the conservative construction of §541(c)(2), *Braden's* reasoning is inapposite to this appeal. The court proceeds to characterize the TIAA/CREF plans under New York law.

Montgomery cited a pair of New York cases (*Matter of Aurora G. v. Harold Aaron G.*, 98 Misc.2d 695, 414 N.Y.S.2d 632 (1979) and *Alexandre v. Chase Manhattan Bank, N.A.*, 61 A.D.2d 537, 403 N.Y.S.2d 21 (1978)) for the proposition that New York law regards the TIAA/CREF plans as spendthrift trusts.[4] In *Alexandre* the court prevented a judgment creditor from reaching her exhusband's TIAA/CREF pension funds. The debtor's only interest in the funds was a contingent interest that would pay him a monthly amount only if he were alive. Further, the court noted the annuity contract's provisions were consistent with the CREF enabling statute that placed beyond a creditor's reach the annuitant's interest in a CREF program. In *Aurora* the court (citing *Alexandre*) likewise found the debtor's contingent interest in the CREF program to be unreachable. However, the court determined the TIAA proceeds could be sequestered because payments had already begun under the TIAA annuity; thus, the debtor's interest in the TIAA fund was no longer contingent. While *Aurora* and *Alexandre* recognize the spendthrift-like qualities of the TIAA/CREF plans, this court does not view those cases as standing for the broad rule that *Montgomery* announced — that the TIAA/CREF plans are spendthrift trusts under New York law.

The New York Legislature has not been silent on the issue of spendthrift trusts. Under New York law all express trusts are presumed to be spendthrift unless the settlor expressly provides otherwise. N.Y. Est. Powers & Trusts Law §7-1.5(a)(1) (McKin-

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[3]*Braden* seemed to require only that the plans be enforceable under New York law, not that they constitute valid spendthrift trusts. *See Braden*, 69 B.R. at 94 ("The Court concludes that these (plan) restrictions would be completely enforceable under applicable non-bankruptcy law.").

[4]*Montgomery* acknowledged, however, that neither court specifically used the term "spendthrift trust" in its opinion.

ney 1981-82 Supp.), *cited in Regan v. Ross*, 691 F.2d 81, 86 n.14 (2d Cir. 1982). To constitute an express trust of personal property, there are four essential elements: (1) a designated beneficiary; (2) a designated trustee who is not the beneficiary; (3) a fund or other identifiable property; and (4) the actual delivery of the fund or other property to the trustee with the intention of passing legal title thereto to him as trustee. *Matter of Fontanella*, 33 A.D.2d 29, 304 N.Y.S.2d 829 (1969). In addition, while "no particular formula of words is required to accomplish [a trust] . . . . , the words and acts relied upon must be unequivocal in nature and admit of no other interpretation than that the property is held in trust" (citations omitted). *Id.*

In this court's view, while both the TIAA and CREF annuity contracts satisfy the four essential elements of an express trust, only the CREF contract is so "unequivocal in nature" as to lead this court inexorably to the conclusion that the formation of a trust was the object of the parties' agreement. New York cases have long held that the difference between annuities and trusts for the payment of income to a beneficiary is substantial (citations omitted). *See, e.g., Petition of Tomasetti*, 147 N.Y.S.2d 885, 886 (N.Y. Sur. 1955).

> The primary distinction between an annuity and a trust is that an annuity confers upon the beneficiary a right to a fixed and certain sum of money, whereas a trust confers upon a beneficiary an indefinite and uncertain sum of money based upon actual income. . . . [W]here there is no provision for invasion of principal, the Courts have held that a trust rather than an annuity has been created (citations omitted).

In re Folsom's will, 155 N.Y.S.2d 140, 148 (N.Y. Sur. 1956), *aff'd* 6 A.D.2d 691, 174 N.Y.S.2d 116 (N.Y.A.D. 1958), *aff'd sub. nom. In re Folsom's Estate*, 6 N.Y.2d 886, 190 N.Y.S.2d 381, 160 N.E.2d 857 (N.Y. 1959).

The CREF contract provides: "The amount of dollars payable will fluctuate in accordance with the current value of an Annuity Unit, which will change primarily with changes in the value of the common stocks and other assets of CREF. *No guarantee of dollar*

amounts is provided. . ." (emphasis added). A CREF annuitant is not guaranteed a fixed dollar amount but a variable share of the portfolio's return, depending upon the annuitant's actuarial circumstances. Accordingly, the court finds the CREF annuity contract to constitute an express trust under New York law; indeed, pursuant to EPTL §7-1.5(a)(1), this express trust is a spendthrift trust, the settlor not having provided otherwise.

The TIAA contract is not a trust, however. Annuity benefits under TIAA are determined by an elaborate Rate Schedule, which considers an annuitant's age, gender, and other significant actuarial factors. TIAA reserves the right to update a Rate Schedule as provided in Paragraph 12. Paragraph 12 provides: "TIAA may, at any time and from time to time, substitute a new Rate Schedule applicable to all retirement annuity contracts of this form, in lieu of the Rate Schedule then in effect. . . . The new Rate Schedule will apply *only to those premiums that fall due on or after the effective date of the new Rate Schedule* . . . (emphasis added)." In other words, when an annuitant purchase[5] a fully paid portion of a life annuity, the rates then in effect will forever determine the income payable to the annuitant as to that fully paid portion. The annuitant is guaranteed a fixed, predetermined income from such fully paid portions, irrespective of the portfolio's later returns. Thus, if the fund's earnings in a given year were inadequate to pay all its annuity obligations, the shortfall would have to paid out of the fund's principal. The above case law dictates this benefit scheme characterizes an annuity, not a trust.

Accordingly, this court having found the CREF component of Morter's retirement plan excluded from the bankruptcy estate pursuant to §541(c)(2), the judgment of the Bankruptcy Court is hereby VACATED in part and AFFIRMED in part. The case is REMANDED for a determination of the value of the TIAA plan. In addition, Morter asks this court to find the TIAA plan exempt from the bankruptcy estate pursuant to Indiana or other applicable state law. On this issue, the Bankruptcy Court correctly

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[5]by paying the premium then due

applied Indiana law and properly determined the only allowable exemption on the annuity contract is the $100 intangible personal property exemption pursuant to I.C. 34-2-28-1(a)(3). IT IS SO ORDERED.

DATED: February 6, 1990.

Allen Sharp

CHIEF JUDGE
NORTHERN DISTRICT OF
INDIANA

cc: Holder/Justice
Opperman
Zawalich
Chosnek
J. Lindquist

In The
United States Court of Appeals
For the Seventh Circuit

No. 90-1534

RAYMOND LIONE MORTER,
aka d/b/a SWINENGINEERING, INC.,

Debtor-Appellant,

v.

FARM CREDIT SERVICES,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
Civil No. L89-62 — **Allen Sharp,** *Chief Judge.*

ARGUED DECEMBER 12, 1990 — DECIDED JULY 16, 1991

Before BAUER, *Chief Judge*, FLAUM and KANNE, *Circuit Judges.*

BAUER, *Chief Judge.* Raymond Lione Morter served as a professor of veterinary science at Purdue University for more than thirty years. He was forced to retire at age seventy in the fall of 1990 because of Purdue's mandatory retirement policy. As a condition of his employment at Purdue, Morter was required to participate in Purdue University's retirement plan, the Teacher's Insurance and Annuity Association of America/College Retirement and Equity Fund ("TIAA-CREF"). Although a participant may make voluntary payments to the plan, Morter chose not to do so; Purdue paid all preretirement contributions on his behalf.

The retirement plan in question -- TIAA-CREF — provides funding for the retirement programs of over half a million employ-

ees in over 3000 colleges and universities. *See generally Peters v. Wayne State University*, 476 F. Supp. 1343, 1346 (E.D. Mich. 1979), *rev'd*, 691 F.2d 235 (6th Cir. 1982). The TIAA component of the plan is a nonprofit, legal reserve life insurance policy that promises to pay a fixed annuity for life based on a contractually guaranteed rate of return, plus dividends, when a beneficiary reaches retirement age. When a participant retires, TIAA applies preretirement contributions to purchase a fixed annuity contract for the participant's benefit. TIAA places the preretirement accumulations in the payout annuity pool. The plan then evaluates the participant's life expectancy and calculates benefits for him. The plan adjusts the benefits of all other participants in the annuity pool based on that expectancy. If the participant dies before the time projected, the other participants in the pool will have more funds available to them. If the participant outlives TIAA's projection, the contributions of the other participants to the annuity pool will be used to continue the contractually guaranteed benefits and dividends as declared. Annuity income begins not later than April 1 of the calendar year following the year in which an annuitant attains the age of 70½ years.

CREF is a companion nonprofit corporation created to invest in financial instruments other than those traditionally permitted for fixed annuity funds like TIAA. Unlike TIAA, CREF provides an annuity that varies with the success of its investments.

The strict anti-assignment provision of TIAA-CREF makes it impossible for annuitants to reach the funds in their accounts before retirement. *See Connick v. Teachers Insurance and Annuity*, 784 F.2d 1018, 1021 (9th Cir.) (annuitant may not reach assets of TIAA-CREF plan until retirement, and then only as set forth in the plan), *cert. denied*, 479 U.S. 822 (1986). The TIAA and CREF contracts state that the plan makes "no provision for cash surrender or loans and cannot be assigned." The TIAA contract specifically provides:

> 16. *No assignment.* Any assignment or pledge of this contract or of any benefit hereunder will be void and of no effect.
>
> 17. *Protection Against Claims of Creditors.* The benefits, options, rights, and privileges accruing to any Beneficiary will not be transferable or subject to surrender, commuta-

> tion, or anticipation, except as may be otherwise endorsed on this contract. To the extent permitted by law, annuity and other benefit payments will not be subject to claims of any creditor of any Beneficiary or to execution or to legal process.

Clause 17 of the CREF contract contains similar language protecting benefits against the claims of creditors. Pursuant to these provisions, Morter had no access to the accumulation of assets in the TIAA-CREF retirement plan short of retirement or death.

In June 1986, Morter filed a voluntary petition for bankruptcy pursuant to Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§101-1330 (1978). A bankruptcy estate consists of "all legal and equitable interests of the debtor in property as of the commencement date." 11 U.S.C. §541(a)(1). Sections 522 and 541 of the Code permit a debtor to retain certain assets. In particular, section 541(c)(2) provides, "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under nonapplicable nonbankruptcy law is enforceable in a case under this title." Thus, if state law prevents a creditor from reaching certain income payable at a future date, then the Bankruptcy Code similarly will treat that income as outside the bankruptcy estate and unreachable by creditors.

On his schedule listing property exempt from the bankruptcy estate, Morter listed his interest in the TIAA-CREF retirement plan at $280,795.86. Both the Farm Services Credit of Madison, Wisconsin (d/b/a Product Credit Association and d/b/a The Federal Bank Association) and the United States Trustee objected to the claimed exclusion of the TIAA-CREF retirement plan, so the matter was submitted to the bankruptcy court for decision. On July 6, 1989, the court issued a Memorandum and Order sustaining the objections to Morter's claimed exemptions. The court ruled that the retirement plan was the property of the bankruptcy estate and that the only exemption Morter could take was a $100 intangible personal property right allowed by Indiana law. *See* Ind. Code §34-2-28-1(a)(3) (1980). On February 6, 1990, the district court issued a Memorandum Opinion and Order that

vacated in part and affirmed in part the judgment of the bankruptcy court. From that judgment, Morter brought a timely appeal.

State law determines whether access to a fund is sufficiently restricted to qualify for exclusion from the bankruptcy estate. The TIAA and CREF contracts expressly state that New York law governs their interpretation. Applying New York law, the district court concluded that the CREF component of the retirement plan was exempt from the bankruptcy estate, but that the TIAA component was not. *See Morter aka d/b/a Swinengineering, Inc. v. Farm Credit Services*, 110 B.R. 390, 393 (N.D. Ind. 1990). The basis for the dissimilar treatment was TIAA's provision of a fixed annuity that carried the possibility that the plan administrators might have to invade the corpus to pay the promised benefits if the fund suffered a shortfall in any given year. The district court characterized this benefit scheme as an annuity, not a trust. In contrast, CREF does not guarantee annuitants a fixed dollar amount but, rather, a variable share.

In order to decide whether TIAA-CREF was exempt from Morter's bankruptcy estate under section 541(c)(2) of the Bankruptcy Code, the district court examined in some detail the legislative history of the provision. The court determined that Congress intended to exclude from bankruptcy estates only "traditional" — i.e., donative — spendthrift trusts under applicable nonbankruptcy law. *See Morter*, 110 B.R. at 395. *See also* H.R. Rep. No. 95-595, 9th Cong., 1st Sess. 369, *reprinted in* 1978 U.S. Code & Admin. News 5963, 6325; S. Rep. No. 95-989, 95th Cong., 2d Sess. 83, *reprinted in* 1978 U.S. Code & Admin. News 5787, 5868. Characterizing a retirement plan as a spendthrift trust is simply another way of stating the conclusion that it must be excluded from the bankruptcy estate. A spendthrift trust is one "created to provide a fund for the maintenance of a beneficiary and at the same time to secure the fund against his improvidence or incapacity." *Black's Law Dictionary* 1400 (6th ed. 1990). The classic example of such an arrangement is the trust a parent might set up for an irresponsible child who might fritter away the funds

before reaching majority. Of critical importance, then, is whether a fund has access restrictions similar to those of a spendthrift trust, which "place the fund beyond the reach of the beneficiary's creditors, as well as . . . secure the fund against the beneficiary's own improvidence." *Matter of Goff*, 706 F.2d 574, 580 (5th Cir. 1983).

Morter believes that the district court over-emphasized the importance of the fact that TIAA someday might have to reach into its own funds. In this appeal, both he and *amicus curiae* TIAA-CREF argue that, in reviewing pension plans to determine whether they are included or excluded from the bankruptcy estate, courts properly should focus on whether the *debtor* has access to the funds. If, as here, the debtor's access is restricted by a ban on receiving any of the funds until retirement, a prohibition against lump sum distributions, and restrictions on alienation, the pension should be excluded from the bankruptcy estate.

Courts are split on the standards for determining whether a given set of restrictions on transfer and debtor access are sufficient to warrant the exclusion of a retirement or pension plan from a bankruptcy estate under 11 U.S.C. §541(c)(2). Some have held that the plan must constitute a traditional spendthrift trust under applicable state law. *See, e.g., In re Swanson*, 873 F.2d 1121, 1123 (8th Cir. 1989); *In re Lichstrahl*, 750 F.2d 1488, 1490 (11th Cir. 1985); *Goff*, 706 F.2d at 587. *Cf. In re Nadler*, 122 B.R. 162, 166 (Bankr. D. Mass. 1990) (section 541(c)(2) applies only "to the type of trust that traditionally has contained restrictions on assignments and not to trusts involving employee benefits"). Other courts have held that the plan need only exhibit the characteristics of a spendthrift trust under state law to be exempt. *See., e.g., McClean v. Central States, Southeast and Southwest Areas Pension Fund*, 762 F.2d 1204, 1207 n.1 (4th Cir. 1985) ("Nowhere in [§541(c)(2)] is there a requirement that the trust be 'traditional,' nor is there any definition of what might be found to constitute a 'traditional' trust."); *In re Atallah*, 95 B.R. 910, 919 (Bankr. E.D. Pa.

1989) ("Section 541(c)(2) is not limited to traditional spendthrift trusts, but also applies to pension funds which exhibit the characteristics of a spendthrift trust."); *In re Watkins*, 95 B.R. 483, 488 (W.D. Mich. 1988) (pension plan is enforceable under Michigan law as a spendthrift trust because it prohibits alienation of interest); *In re Hysick*, 90 B.R. 770, 775 (Bankr. E.D. Pa. 1988) (court must look at "a variety of factors"); *In re Pettit*, 61 B.R. 341, 346 (Bankr. W.D. Wash. 1986) ("The degree of control that the debtor may exercise over the trust assets is a crucial factor in determining the issue of inclusion in, or exclusion from, the bankruptcy estate."); *In re Threewitt*, 24 B.R. 927, 929 (D. Kan. 1982) ("relevant question is not whether the Plan looks like a good, old fashioned spendthrift trust"). *See also In re Vogel* 78 B.R. 192, 195 (Bankr. N.D. Ill. 1987); *In re Guernsey*, 54 B.R. 68, 69 (Bankr. S.D. Fla. 1985); *In re Kwaak*, 42 B.R. 599, 602 (Bankr. D. Me. 1984); *In re Phillips*, 34 B.R. 543, 546 (Bankr. S.D. Ohio 1983).

The collective wisdom of this second group of cases is persuasive: the plain language of section 541(c)(2) does not require that a retirement plan be a "traditional" spendthrift trust. We agree with the Fourth Circuit's reasoning in *McClean* that section 541(c)(2)

> should [not] be confined in its recognition of enforceable transfer restrictions to those found in "traditional" spendthrift trusts. The language of §541(c)(2) does not suggest such a limitation, and the legislative history reveals only that the provision has the unambiguous purpose of preserving enforceable transfer restrictions in spendthrift trusts. . . .

762 F.2d at 1207 n.1. Even in cases in which courts have included retirement plans within the bankruptcy estate, there has been a willingness to exclude the plan if it is employer-created and controlled and, therefore, analogous to a spendthrift trust. *See., e.g., Swanson*, 873 F.2d at 1124 (court indicated that the law creating a teacher retirement fund included language similar to that found in spendthrift trusts, but because the debtor-teacher contributed to the fund, the retire-

ment plan was self-settled and would not qualify as a spendthrift trust under Minnesota law); *Goff*, 706 F.2d at 589 (employer-created and controlled retirement plans may be characterized as "spendthrift trusts" for purposes of 11 U.S.C. §541(c)(2) even though they are not traditional spendthrift trusts).

Moreover, in every decision we could find that addressed the very pointed question whether TIAA is a spendthrift trust under New York law, the answer was a resounding "yes." *See, e.g., In re Reynolds*, No. 87-1515311F, slip op. (Bankr. W.D. Ark., September 18, 1989); *In re Montgomery*, 104 B.R. 112 (Bankr. N.D. Iowa 1989); *In re Woodward*, No. 3-86-03344(3), A.P. No. 3-87-0036, slip op. (Bankr. W.D. Ky., February 16, 1988), *aff'd*, No. 3-86-03344(3)7 Civil Action C88-0161-L(A), slip op. (W.D. Ky., June 24, 1988); *In re Braden*, 69 B.R. 93 (Bankr. E.D. Mich. 1987). In addition, two New York state courts have held that the TIAA-CREF plan has all the characteristics of a spendthrift trust necessary to allow the plan to be excluded under section 541(c)(2). *See Matter of Aurora G. v. Harold Aaron G.*, 98 Misc.2d 695, 414 N.Y.S.2d 632 (1979); *Alexandre v. Chase Manhattan Bank*, 61 A.D.2d 537, 403 N.Y.S.2d 21 (1978).

The proper inquiry under section 541(c)(2), then, is not whether the accumulated funds are in a "traditional" spendthrift trust, but whether the retirement plan bars the beneficiary and his creditors from reaching the funds. If it does, the plan is tantamount to a spendthrift trust under state law. When we look at a retirement plan to determine whether it is a spendthrift trust, the fact that the plan administrators might have to dip into the fund to make up any shortfall is not as important to the analysis as the extent of access to the plan and who has that access.

What about Morter's retirement plan? It is not "self-settled," *see Swanson*, 873 F.2d at 1124, because participation in the plan is a condition of employment and Purdue University contributed the entire amount of Morter's TIAA contract. In estab-

lishing the plan and in contributing the entire cost of Morter's participation, Purdue University intended to provide for the maintenance and support of Morter and his dependents during his retirement, while at the same time protecting him against his own improvidence with regard to the use of the plan funds prior to that time. Consequently, the plan was set up so that Morter would not have any control over the accumuation of its assets until retirement, and then only as set forth in the plan.

The plan provides that, upon retirement, Morter will receive monthly payments from his TIAA plan; he will not receive a lump-sum distribution of the assets. Although Morter can opt to receive a ten percent distribution on retirement, he does not have access to the other ninety percent that will generate income to be paid out over time. The fact that ninety percent of the fund is distributed in the form of periodic payments demonstrates that the fund was structured to insure the preservation of the corpus. To our mind, this scheme bears all the earmarks of a spendthrift trust. *Cf. Watkins*, 95 B.R. at 488 (plan was employer-created and controlled; plan established a pension fund, a plan trustee, and designated named fiduciaries; plan contained provisions for acts of trust administration; plan provided for distribution of monthly benefits with no provisions for lump sum distributions).

Further, the TIAA plan would be enforceable as a spendthrift trust under state law because, in New York, all express trusts are presumed to be spendthrift unless the settlor expressly provides otherwise:

> The right of a beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof is conferred upon such beneficiary by the instrument creating or declaring the trust.

N.Y. Est. Powers & Trust Law §7-1.5(a)(1) (McKinney 1988). *See In re Kriess*, 72 B.R. 933, 942 (Bankr. E.D.N.Y. 1987) ("N.Y. Est. Powers and Trust Law section 7-1.5(1)(1) effec-

tively renders all trusts in New York mandatory spendthrift trusts unless designated otherwise in the trust instrument."). Not only that, pension plans that bar a beneficiary's access "create a situation analogous to a spendthrift trust . . . [that] must be enforced according to their spirit." *In re Guardianship of Dugan*, 29 Misc.2d 980, 982, 22 N.Y.S.2d 831, 833 (1961). Moreover, as noted above, New York courts explicitly have stated that TIAA-CREF plans are spendthrift trusts. *See Montgomery*, 104 B.R. at 117 n.8 ("The substance of [*Alexandre*, 403 N.Y.S. 2d 21, and *Matter of Aurora G.*, 414 N.Y.S.2d 632,] . . . leads the Court to conclude that the New York courts considered the TIAA-CREF plans to be spendthrift trusts."). There can be no doubt: New York law puts Morter's pension benefits well beyond the reach of Farm Credit Services or any other creditor.

To hold otherwise would defeat the legitimate expectations of Purdue University when it set up the plan and paid Morter's share of contributions. The district court held that, although both the TIAA and CREF annuity contracts satisfied the elements of an express trust, "only the CREF contract is so 'unequivocal in nature' as to [whether] the formation of a trust was the object of the parties' agreement." *Morter*, 110 B.R. at 395. We disagree. Purdue University could have fashioned a retirement plan any number of ways. Instead, the University set up a trust so that Morter would be provided for during his retirement and his dependents taken care of after his death. To that end, Morter was denied access to his funds until retirement. Even then, he does not have access to the entire accumulated contributions Purdue University made to TIAA; he receives only a stream of income paid on a monthly basis. One of the underlying policies of 11 U.S.C. §541(c)(2) is to protect the legitimate expectations of the provider of the funds:

> Section 541(c)(2) . . . strikes a delicate balance between enlarging the bankruptcy estate, while still honoring the spendthrift trust donor's wishes under state law. For it is the donor's desires which are protected through the concept of the spendthrift trust. . . . [T]his is underscored by

> the legislative history of §541(c)(2) which notes that "[t]he bankruptcy of the beneficiary . . . should not be permitted to defeat the *legitimate expectations of the settlor* of the trust."

Swanson, 873 F.2d at 1124 (citation omitted) (emphasis in original). The university's retirement fund was structured a certain way for a specific purpose. This purpose cannot be fulfilled if the plan can be raided in order to satisfy creditors.

For the above reasons, we conclude that both the TIAA and CREF components of Morter's retirement plan are exempted from the bankruptcy estate under 11 U.S.C. §541(c)(2). Thus, we need not address Morter's argument that Indiana's recently amended exemption statute, Ind. Code §34-2-28-1 (1990), prohibits levy or execution by judgment creditors on pension funds. That part of the district court's judgment including the TIAA portion of Morter's pension in the bankruptcy estate is hereby

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit